Supreme Court, U.S.
FILED

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No. 99-

IN THE
Supreme Court of the United States

BAYER CORPORATION,

Petitioner,

v.

HOOVER COLOR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the meeting competition defense under Section 2(b) of the Robinson-Patman Act requires proof that a seller offered a particular price at a point in time in order to match an individual competitor's price, thus foreclosing its application to discount price schedules that have been established in response to known competitive offers and revisited periodically based on available market information.

2. Whether summary judgment should be denied on a defendant's meeting competition defense simply on the ground that issues of intent and credibility are for the jury, where a defendant presents undisputed evidence that a reasonable and prudent seller would act as it did to meet competitive prices, and that it was in fact so motivated, and the plaintiff fails to present any significant probative evidence to the contrary.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are identified in the caption of the case. Petitioner Bayer Corporation is wholly owned by Bayer AG. Bayer Corporation has the following partly-owned subsidiaries: Bayer Diagnostics India Ltd.; Bayer-Pursell LLC; Bayer-Roche LLC; Bayer Sankyo Co. Ltd.; Dystar Corporation; Dystar L.P.; Exatec LLC; Gustafson LLC; Millennium Pharmaceutical Inc.; Myriad Genetics, Inc.; Onyx Pharmaceuticals, Inc.; QC Construction Products LLC; and Schein Pharmaceuticals, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTE INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE WRIT 9

I. THE FOURTH CIRCUIT'S HOLDING THAT THE ROBINSON-PATMAN ACT'S MEETING COMPETITION DEFENSE ONLY APPLIES WHERE THE DEFENDANT SHOWS THAT THE CHALLENGED PRICE MATCHED A SPECIFIC OFFER OF AN INDIVIDUAL COMPETITOR CONTRAVENES THIS COURT'S DECISION IN *FALLS CITY* AND THE DECISIONS OF OTHER CIRCUITS 9

II. APART FROM THE FOURTH CIRCUIT'S OVERLY RESTRICTIVE CONSTRUCTION OF THE MEETING COMPETITION DEFENSE, THE COURT ALSO ERRED IN VIRTUALLY FORECLOSING THE AVAILABILITY OF SUMMARY JUDGMENT BECAUSE DEFENDANT'S INTENT IS IN ISSUE 15

A. There Is A Conflict In The Circuits Concerning The Standard For Granting Summary Judgment Under Section 2(b) 15

B. Numerous Decisions Of This Court Indicate The Summary Judgment Should Be Entered For Defendant On The Section 2(b) Defense, When The Evidence Shows That Defendant Acted Reasonably With The Intention To Meet Competition, And Plaintiff Fails To Substantially Controvert That Showing 19

III. THE FOURTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE MEETING COMPETITION DEFENSE WILL IMPEDE COMPETITION, THEREBY HARMING BOTH BUSINESSES AND CONSUMERS, BY CHILLING THE USE OF COMPETITIVE PRICING SCHEDULES 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Alabama Great Southern R.R. v. Louisiana & Nashville R.R., 224 F.2d 1 (5th Cir. 1955) 18
Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 17
Beatrice Foods Co., 68 F.T.C. 286 (1965) 8
Cadigan v. Texaco, Inc., 492 F.2d 383 (9th Cir. 1974) 19
Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966) 13, 14
Continental Baking Co., 63 F.T.C. 2071 (1963) 9
FTC v. A.E. Staley Manufacturing Co., 324 U.S. 746 (1945) 7, 11, 20
FTC v. Standard Oil Co., 355 U.S. 396 (1958) 13
Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) 9, 10, 13, 21, 23
First National Bank v. Cities Service Co., 391 U.S. 253 (1968) 16, 21
Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69 (1979) 15, 20, 23, 24
Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) 19
Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970) 18
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 20, 21
McCaskill v. Texaco, Inc., 351 F. Supp. 1332 (S.D. Ala. 1972), *aff'd without op. sub nom. Harrelson v. Texaco*, 486 F.2d 1400 (5th Cir. 1973) 19
Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37 (7th Cir. 1992) 8, 14, 17, 18

Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987) 14
Standard Oil Co. v. FTC, 340 U.S. 231 (1951) 24
United States v. United States Gypsum Co., 438 U.S. 422 (1978) 15, 18, 20, 24
William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982) 14, 19

Statutes

15 U.S.C. § 13(a) 2
15 U.S.C. § 13(b) 2
28 U.S.C. § 1254(1) 1

Miscellaneous

XIV Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2352h (1999) 22
Robert T. Joseph & Blake L. Harrop, *Proof of the Meeting Competition Defense: Investigation and Verification of Reported Competing Offers*, 62 Antitrust L.J. 127 (1993) 22
F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, § 9.7 (1962) 14
United States Department of Justice, Antitrust Division, Report on the Robinson-Patman Act (1977) 22, 23

PETITION FOR A WRIT OF CERTIORARI

Bayer Corporation ("Bayer") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-15a) was issued on December 3, 1999 and is reported at 199 F.3d 160 (1999). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 43a) was issued on December 27, 1999 and is unreported. The opinion of the United States District Court for the Western District of Virginia, Roanoke Division (Pet. App. 16a-42a) was issued on July 30, 1998 and is reported at 24 F. Supp. 2d 571 (1998).

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit denying petitioner's petition for rehearing and rehearing *en banc* was issued on December 27, 1999. (Pet. App. 43a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2(a) of the Robinson-Patman Act provides, in pertinent part, that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United

> States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .
>
> Section 2(b) of the Act provides, in pertinent part, that:
>
> nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(a), (b).

STATEMENT

Petitioner Bayer seeks review of a decision of the United States Court of Appeals for the Fourth Circuit that reversed an order of summary judgment upholding defendant's meeting competition defense under Section 2(b) of the Robinson-Patman Act, based on two mistaken legal principles. First, it concluded that the defense applies only upon proof that a particular challenged price, available at a point in time, was extended in order to match an individual competitor's price, thus excluding discount price schedules established in light of known competitive offers and revisited from time to time based on available market information. Second, the Fourth Circuit ruled that summary judgment for a defendant on the Section 2(b) defense is rarely available because of the intent issue present in each case, and reversed summary judgment notwithstanding proof of a good faith intent to meet competition and the absence of any significant probative evidence to the contrary. Each of these errors conflicts with decisions of this Court and of other courts of appeals.

Bayer manufactures and sells synthetic iron oxide pigments known as Bayferrox, which are powders used to color materials such as paints and building products. (Pet. App. 16a.) Bayer sells a range of over 50 grades of Bayferrox in shades of black, yellow and red, and competes against other producers who sell either a comparable range of grades or a more limited or less expensive range that competes in a particular market segment (e.g., building products) or in a particular color range or quality level. (Pet. App. 16a, 31a, 35a.) In 1980, Bayer constructed a domestic manufacturing facility in West Virginia, which like many chemical plants had high fixed costs and low marginal costs of production. (Pet. App. 28a.) Bayer thus had an incentive to run the plant at or close to capacity. (*Id.*)

To maximize production at its new plant, Bayer sought long-term, high volume commitments from its distributors, including Rockwood, Bayer's largest distributor. (Pet. App. 28a.) Bayer considered the possibility of volume discounts as an incentive for its distributors to increase their Bayferrox purchases. (*Id.*) At the time, however, Rockwood was selling a significant amount of iron oxides that it purchased from other domestic as well as foreign suppliers. (Pet. App. 29a.) Thus, when Bayer presented its proposal, Rockwood refused to make any long-term commitment unless Bayer would agree to increase the discounts (and thus lower the prices) in its proposed volume discount schedule. (*Id.*) Rockwood also told Bayer that Bayer's *existing* business was at risk unless Bayer lowered its prices. (*Id.*)

Bayer assessed Rockwood's statements in the context of other information available to Bayer in the marketplace, concluding that Rockwood in fact was buying one-third of its synthetic iron oxide requirements at lower prices from other sources. (Pet. App. 29a & 11.) Bayer verified import trends at the time; it also talked to various end-users, who confirmed the availability of lower-cost alternatives to Bayferrox. (Pet

App. 29a-30a.) Rockwood, as Bayer knew, focused significantly on sales to the building products industry, and had the ability to substitute lower-cost foreign grades for Bayferrox into blends for sale to that industry. (Pet. App. 29a, 31a, 35a.)

Based upon its investigation, Bayer prepared a written analysis documenting its belief regarding the *competitors* that were selling to Rockwood as well as the *prices* and *volumes* at which they were doing so. (Pet. App. 30a-31a.) In that analysis, Bayer calculated the lower price it would need to charge for all of Rockwood's business in order to match Rockwood's competitive offers. *(Id)*.[1] Bayer then modified its volume discount schedule to respond to the prices at which it believed Rockwood was purchasing from Bayer's competitors. (Pet. App. 29a-31a.) Bayer reasonably believed that it risked losing at least some of Rockwood's business if it did not do so. (Pet. App. 29a-30a.) Bayer subsequently entered into a long-term agreement with Rockwood. (Pet. App. 17a-18a n.4.) In 1981, Bayer extended the same basic volume discount schedule to Lansco, another major distributor of Bayferrox, as well as respondent Hoover Color Corporation ("Hoover"), another Bayer distributor. (Pet. App. 32a.)

Bayer and Rockwood renegotiated their agreement in 1985. (Pet. App. 31a.) Bayer still needed committed volumes from its distributors to support its West Virginia plant. (*Id.*) Rockwood, however, again threatened to shift its purchases away from Bayer in the absence of discounted prices and Bayer still believed that Rockwood would do so. (*Id.*) Bayer corroborated Rockwood's statements about the availability of competitive price offers and agreed to continue to discount its prices because it believed from its prior dealings that

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[1] This critical document was included in the Joint Appendix before the Fourth Circuit, at pages JA 962-69. The Fourth Circuit never referred to it in evaluating whether there could have been any fact dispute regarding Bayer's good faith belief that it was meeting competition.

Rockwood could seriously damage Bayer's business if Rockwood carried out its threats. (Pet. App. 31a-32a.) In 1987, Bayer extended this volume discount schedule to Lansco and Hoover. (Pet. App. 32a.)

By the late 1980's, increasing volumes of lower-priced synthetics were entering the United States from the Far East and other places. (Pet. App. 35a-37a & n.19.) As a result, Rockwood and Lansco increasingly were able to wield the threat of lower prices as a club in their negotiations with Bayer. (Pet. App. 33a, 35a-37a.) Those changing marketplace conditions led Bayer to renegotiate its Rockwood agreement in 1990. (Pet. App. 35a & n.14.) Rockwood again advised Bayer that it had offers to purchase synthetic iron oxides from other sources at lower prices and threatened to do so unless acceptable terms were reached. (Pet. App. 35a.) Just as Bayer was forced to do in 1980 and 1985, Bayer continued to discount its prices to Rockwood in an effort to respond to those competitive threats. (Pet. App. 35a-36a.)

Rockwood continued to advise Bayer of competitive offers even after the 1990 contract. (Pet. App. 36a-37a.) At times, the offers were so low that Bayer concluded that it could not lower its prices to those levels. (Pet. App. 36a.) Thus, in spite of Bayer's discounted prices, Rockwood increasingly purchased non-Bayer synthetic iron oxides in the 1990's. (Pet. App. 37a & n.19.) Lansco also dramatically increased its purchase of synthetic iron oxides from other sources in the 1990's. (Pet. App. 37a & n.19, 40a.) The threat eventually became so serious that Bayer explored ways of revising its distribution system and reducing its dependence on distributors. (Pet. App. 37a-38a.)

In 1994, in the midst of this marketplace turmoil, Bayer again renegotiated its agreements with Rockwood and Lansco. (Pet. App. 39a.) During those negotiations, Rockwood and Lansco both presented Bayer with competitive offers. (Pet. App. 36a, 39a-40a.) Bayer believed that both would shift

purchases away from Bayer in the absence of lower prices because they were already doing so. (Pet. App. 39a-41a & n.21.) While Bayer did reduce the discount (i.e., raise the price) somewhat in the 1994 agreements, Bayer did not raise its price as much as it otherwise would have done because it feared that Rockwood and Lansco would increase their purchases from non-Bayer sources. (Pet. App. 39a-41a.)

By 1996, Bayer and Rockwood were ending their relationship and Bayer had acquired Lansco. Also in that year, Bayer terminated Hoover as a distributor, and Hoover filed this lawsuit shortly thereafter, in the fall of 1996. In May 1998, Bayer moved for summary judgment on several grounds, including the meeting competition defense, the functional availability defense, and the failure of Hoover to show any injury caused by any claimed price differential.

The district court granted summary judgment on Bayer's meeting competition defense.[2] Noting that it was taking "a harder look at the evidence presented by both sides" given the posture of the case on summary judgment (Pet. App. 23a), the court found the material facts to be "uncontested," (Pet. App. 30a, 31a, 32a, 34a, 35a, 41a), and "uncontroverted." (Pet. App. 42a.)

The court found that Bayer knew that Rockwood and Lansco had lower prices available to them, based on its contemporaneous communications with them as well as prior dealings and based on Bayer's own knowledge of the industry and the competitive prices available in the marketplace. (Pet. App. 29a-33a, 35a-37a, 39a-41a & n.21.) Starting with the earliest of the Rockwood contracts, the court stated it had "no trouble concluding that, as a matter of law, Bayer's proposed discount pricing schedule was made in a good faith attempt to

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[2] Neither the district court nor the Fourth Circuit resolved any of the other grounds for Bayer's motion.

meet competition for Rockwood's business," (Pet. App. 30a), finding that it was "the only reasonable conclusion." (Pet. App. 30a, 31a.) The court then evaluated the subsequent contracts, finding in each case that "the uncontested facts support only a conclusion that" Bayer acted "in a good faith attempt to meet competition" (Pet. App. 32a); that "Bayer was continuing to meet competition"(Pet. App. 33a); that the "uncontested facts . . . leave as the only reasonable conclusion that Bayer altered its price structure during the 1990 negotiations in an attempt to meet competition from foreign producers for Rockwood's business" (Pet. App. 35a-36a); and that "the uncontested material facts establish that equally low prices were available to Lansco and Rockwood, and that Bayer was faced with a competitive necessity to meet competition for Lansco's and Rockwood's business." (Pet. App. 41a-42a (footnotes omitted).) In sum, the court concluded that

> [T]he uncontroverted evidence regarding the relationship of principals and the dynamic market for synthetic iron oxides in the 1980's and 1990's clearly establishes that Bayer offered its lower prices to Rockwood and Lansco out of a good faith competitive necessity to meet competition for their business. Hoover fails to present any material evidence to counter this conclusion.

(Pet. App. 42a.)

The Fourth Circuit reversed the district court's grant of summary judgment. The Fourth Circuit agreed that Bayer had "indisputably" demonstrated both "'competition in the market and the threat of reduced sales as a result of that competition.'" (Pet. App. 9a (quoting Pet. App. 24a n.8).) The court further agreed that Bayer had set its volume discount schedule "in response to" competitive pressures. (Pet. App. 10a.) Concluding, however, that more is required — that "§ 2(b) 'places emphasis on individual competitive situations, rather than upon a general system of competition,'" (*Id.* (quoting *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945))), and that

a defendant must prove "a good faith attempt to match an individual competitor's price," (Pet. App. 10a)[3] — the court found Bayer's evidence to be insufficient. The Fourth Circuit thus reversed summary judgment on the ground that the district court had applied the wrong standard in allowing the defense without proof that each challenged price was offered to match the price of an individual competitor. (Pet. App. 8a-11a.)

The Fourth Circuit also noted as a general proposition that summary judgment for a defendant on the Section 2(b) defense is "rarely granted," given the statute's "emphasis on intent and good faith" and because the defendant bears the burden of proof. (Pet. App. 7a.) After reviewing a small portion of the evidence upon which the district court relied in granting summary judgment, the Fourth Circuit turned, "perhaps more importantly," (Pet. App. 13a), to evidence offered by Hoover to rebut the defense. First, the Fourth Circuit stated that Hoover had identified "a possible alternative motive" for

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[3] The Fourth Circuit seems to have compounded its error with the mistaken belief that, based on the "literal language" of Section 2(b), this Court has required sellers to prove "a good faith attempt to *match* an individual competitor's price." (Pet. App. 10a (emphasis added).) *See also* Pet. App. 11a (Bayer must show "actual or imminent lower price offers . . . matched by Bayer with its volume discount pricing structure"); Pet. App. 12a (evidence that distributors brought lower price offers that they "sought to have Bayer match" is not enough "[b]ecause Bayer did not match either offer"); Pet. App. 12a-13a (Fourth Circuit distinguishes *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (7th Cir. 1992), concluding that there was evidence in that case that the seller was asked to match competitive offers and did so); Pet. App. 14a ("a fact-finder could reasonably conclude that Bayer engaged in volume discount pricing not to match a competitor's prices"); Pet. App. 14a-15a (court refers to a "possible conclusion that Bayer did not create the volume-based discount pricing system to match the offers of a competitor"). Neither the language of Section 2(b) nor the decisions interpreting it support this apparent requirement that a seller must literally seek to "match" a competitor's price with an equal price. *See Beatrice Foods Co.*, 68 F.T.C. 286, 350 (1965).

Bayer's volume discount schedule, (*Id.*), namely, Bayer's desire to encourage its distributors to increase their purchases from Bayer's new plant. The court thus rejected the district court's view that the economics of Bayer's new facility in fact provided the "competitive necessity" for Bayer to meet competition. (Pet. App. 42a n.22.) Second, the court pointed to evidence that Rockwood's president on one occasion in 1992 perceived Bayer as unconcerned with low imported prices, and that Bayer initiated the negotiations for the 1994 agreement with Lansco, as bases for a possible inference that Bayer's volume discount schedule was not motivated by a desire to meet competition. (Pet. App. 14a.) Finally, the Fourth Circuit reasoned that provisions in Bayer's agreements with Rockwood, requiring Rockwood to notify Bayer of lower competitive offers and afford Bayer an opportunity to match the price, could support an inference that "Bayer did not need or intend the volume discounts to match competing offers." (Pet. App. 14a-15a.)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT THE ROBINSON-PATMAN ACT'S MEETING COMPETITION DEFENSE ONLY APPLIES WHERE THE DEFENDANT SHOWS THAT THE CHALLENGED PRICE MATCHED A SPECIFIC OFFER OF AN INDIVIDUAL COMPETITOR CONTRAVENES THIS COURT'S DECISION IN *FALLS CITY* AND THE DECISIONS OF OTHER CIRCUITS

In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 451-52 (1983), this Court vacated a judgment for plaintiff, and discussed at length the meeting competition defense under Section 2(b) of the Robinson-Patman Act. That discussion made clear that the Section 2(b) defense is "'flexible and pragmatic, not . . . technical or doctrinaire,'" *id.* at 441 (quoting *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963)), and that the seller must show "that under the circumstances it was reasonable to believe that the quoted price

or a lower one was available to the favored purchaser or purchasers from the seller's competitors." *Id.* at 438.

The Court expressly rejected a number of formalistic objections to the application of the defense that were advanced in that case. One of them would have made the defense inapplicable on the ground "that Falls City set prices statewide rather than on a 'customer to customer basis.'" 460 U.S. at 447.[4] Specifically, this Court concluded:

> There is no evidence that Congress intended to limit the availability of § 2(b) to customer specific responses . . . . Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them . . . . We conclude that Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.

Id. at 448.

The Fourth Circuit's decision is at odds with this aspect of the *Falls City* holding because it requires defendants to show that their challenged prices are customer-specific responses to specific competitive offers. The court below conceded that "[i]f a seller could prove the meeting competition defense under the Robinson-Patman Act by 'document[ing] competition in the market and the threat of reduced sales as a result of that competition,' as the district court believed, we would agree that indisputably Bayer has established the [meeting competition] defense in this case." (Pet. App. 9a.) That conclusion should have compelled an affirmance of the district

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[4] This Court in *Falls City* also rejected assertions that the Section 2(b) defense is unavailable because prices were not lowered but rather were increased in differing amounts to meet competition, 460 U.S. at 444; because the motive for increasing prices was to increase profits, *id.* at 444-45; and because the pricing decisions were aimed at securing new customers rather than retaining existing ones. *Id.* at 446.

court's opinion. The Fourth Circuit reversed, however, because it asserted a distinction between a "good faith attempt to meet general competition in the marketplace," and the "considerably more limited" scope of the defense as enacted by Congress. (*Id.*) According to the Fourth Circuit, this Court "has repeatedly emphasized the necessity of proof of a good faith attempt to match an individual competitor's price." (Pet. App. 10a.)[5] On the facts of this case, it concluded, Bayer had not carried this burden. (Pet. App. 15a.)

The Fourth Circuit thus rejected, as legally inadequate, uncontroverted evidence that Bayer set the discount levels in its volume discount pricing schedule in response to Rockwood's threats to take its business elsewhere in the absence of price concessions, and thereafter revisited and adjusted its schedule periodically in light of specific information concerning the availability of competitive products and the prices at which they were being offered to Rockwood and Lansco. That uncontroverted evidence demonstrated more than just general competition in the marketplace. It showed that, when Bayer first approached Rockwood in 1980, "Rockwood demanded that Bayer lower its proposed price for Bayferrox, or Rockwood would not commit to purchase high volumes," and, indeed, "threatened to reduce its purchases." (Pet. App. 29a, 32a.) The uncontroverted evidence further showed that Bayer otherwise knew that Rockwood already purchased one-third of its requirements from other sources, that Rockwood could easily rely on synthetic iron oxides

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[5] To substantiate this point, the Fourth Circuit quoted the same language from *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), which had apparently misled the appellate court in *Falls City* to reject the defense in the context of an area-wide pricing schedule. (Pet. App. 10a (quoting 460 U.S. at 447).) ("The Court of Appeals also relied on *Staley* for the proposition that the meeting competition defense places emphasis on individual [competitive] situations, rather than upon a general system of competition.") (quotation omitted).

available from other sources, and that Bayer independently verified through various sources the availability of lower-priced synthetic iron oxides in the market. (Pet. App. 29a-30a.) Indeed, Bayer even prepared a detailed analysis of the prices and volumes at which Rockwood was then buying from Bayer's competitors, and there documented its beliefs concerning the competitors that were selling to Rockwood. (Pet. App. 30a-31a.) In short, the evidence was uncontested that Bayer modified its price schedule to Rockwood in 1980 to meet the competitive threats for Rockwood's business.

The district court addressed not only Bayer's initial decision in the early 1980's, but its subsequent pricing decisions in negotiations with Rockwood in 1985, 1990, and 1994, and with Lansco in 1987 and 1994. (Pet. App. 31a-42a.) As the district court recounts, these pricing decisions were made in light of detailed information periodically received by Bayer (from Rockwood and others) indicating the availability to Rockwood and Lansco of synthetic iron oxides at cheaper prices. (*Id.*) The district court was thus well justified in concluding that the specific discount levels in Bayer's volume discount schedule throughout the years were made in a good faith effort to meet competition.

Perhaps because the claims at issue in this case pertain only to the period from 1992 to 1996, the Fourth Circuit opinion simply ignores the undisputed record evidence showing that, in the early 1980's, Bayer set the specific discount levels in its volume discount schedule expressly to address lower competitive offers. (Pet. App. 28a-31a.) The subsequent evidence, also recounted at length in the district court opinion, (Pet. App. 31a-42a), reveals a continuing process of revisiting and adjusting those discount levels based on a steady stream of information received from customers and elsewhere concerning the availability and pricing of competitive product. Those subsequent pricing decisions are not disqualified from the protection of the Section 2(b) meeting competition defense on

the ground that each individual offer challenged must be "a good faith attempt to match an individual competitor's price." (Pet. App. 9a.) Were that true, no pricing schedule applicable generally or throughout a geographic area could satisfy the Section 2(b) defense. But *Falls City* made clear that the meeting competition defense is applicable to any price offer, whether customer-specific or embodied in a general price schedule, that is a good faith "response[] to competitive conditions." 460 U.S. at 448. *See also FTC v. Standard Oil Co.*, 355 U.S. 396, 405 n.8 (1958) ("continuation of reductions once granted is warranted by § 2(b) when competitors' reduced price offers are recurring again and again in a cutthroat market"). Without question, that test is met on the undisputed facts of this case.

Other courts of appeals likewise have held that pricing schedules adopted in response to prevailing competitive circumstances may satisfy the meeting competition defense even if each price at a particular point in time did not explicitly meet a particular competitor's specific offer. For example, in *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966), a decision cited with approval in *Falls City*, the Fifth Circuit recognized the meeting competition defense based on a volume discount schedule similar to the one employed by Bayer. In doing so, the court stated:

> We have found no authority which holds that in all circumstances the allowance of volume discounts according to a plan or 'system' as distinguished from 'individual competitive' responses is condemned per se. . . . It is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. That decision must be made on a case-by-case basis.

Id. at 442. Given that the seller there sold a variety of carpet grades — just as Bayer sold a variety of iron oxide grades — the Fifth Circuit stated that it would be "burdensome,

unreasonable, and practically unfeasible" to price each carpet style individually and in response to the specific styles of each competitor. *Id.* at 441-42.

Likewise, in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1046 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), the Ninth Circuit recognized the propriety of market-wide price reductions made in a good faith effort to meet competition. Rejecting the plaintiff's argument that the meeting competition defense does not apply to market-wide pricing, the court said:

> [S]ection 2(b) "permits the justification of a seller's lower prices which are granted not only to particular customers tempted by competitive prices, but which respond in a given area by blanket price reductions co-extensive with the price competition to be met."

Id. at 1045 (quoting F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, § 9.7, at 239 (1962)). The court further noted that these "[m]arket-wide reductions are permissible when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market." *Id.* at 1046. *See also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 390 (8th Cir. 1987) (seller must show only its good faith belief that a lower price was available; "[h]ere, the meeting-competition instruction requir[ing] Ambrosia to show the existence of a specific, low-price offer from a competitor to Barg & Foster in order to establish the defense . . . was error."); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 44-45 (7th Cir. 1992) (affirming summary judgment in favor of defendant, holding that defendant established the meeting competition defense based on discounts provided to customers that responded to discounts generally available in the market).

By contrast, the decision below departs from existing law as set forth by this Court and several other courts of appeals, and

threatens to narrow markedly the meeting competition defense in those courts which follow its lead.

II. APART FROM THE FOURTH CIRCUIT'S OVERLY RESTRICTIVE CONSTRUCTION OF THE MEETING COMPETITION DEFENSE, THE COURT ALSO ERRED IN VIRTUALLY FORECLOSING THE AVAILABILITY OF SUMMARY JUDGMENT BECAUSE DEFENDANT'S INTENT IS IN ISSUE

A. There Is A Conflict In The Circuits Concerning The Standard For Granting Summary Judgment Under Section 2(b)

The Fourth Circuit's decision furthers a split among the courts of appeals on the proper standard to apply to a defendant's motion for summary judgment on the meeting competition defense under Section 2(b). The restrictive standard applied by the Fourth Circuit, which it shares with the Eleventh Circuit, all but forecloses a defendant from obtaining summary judgment on the meeting competition defense simply because intent is an issue. In contrast, the Fifth and Seventh Circuits have taken an approach more in conformity with this Court's prior decisions and granted summary judgment when no significant probative evidence is offered to contest a seller's evidence showing a reasonable, good faith intent to meet competition. *See Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 82 (1979) ("'[a] good faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense'") (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978)).

Specifically, the Fourth Circuit in the decision below stated that "[b]ecause of this emphasis on intent and good faith and because the seller has the burden of proving the affirmative defense, courts have rarely granted a seller judgment as a

matter of law on the basis of the defense." (Pet. App. 7a.) Characterizing this as "the heavy burden imposed on a seller attempting to obtain summary judgment on the basis of the meeting competition defense," (Pet. App. 8a), the Fourth Circuit reversed, notwithstanding the extensive and substantial evidence presented by Bayer that it was, in fact, motivated to meet competition in the prices it set, and the absence of any significant probative evidence questioning the veracity or reasonableness of Bayer's actions.[6] To the contrary, Hoover's

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[6] The Fourth Circuit stated that Hoover proffered "significant and direct evidence which, if believed, could rebut Bayer's assertion of the § 2(b) defense." (Pet. App. 13a.) The court's own description of this evidence, however, confirms that none of it is "significant probative evidence," *First National Bank v. Cities Service*, 391 U.S. 253, 290 (1968), relating to whether the discount levels in Bayer's pricing schedules were initially set and thereafter revisited periodically in a good faith, reasonable effort to respond to competitive price offers to Rockwood and Lansco.

First, the court referred to Bayer's admitted need to maintain high production levels as evidence of "a possible alternative motive" for Bayer's action. (Pet. App. 13a.) But, as the district court recognized, the economics of Bayer's manufacturing facility created the "competitive necessity" to set the discount levels in Bayer's schedule to respond to Rockwood's threats. (Pet. App. 42 n. 22.)

Second, the court refers to two isolated pieces of evidence from negotiations during the 1990's as support for an inference that threats by "Bayer's distributors to change suppliers did not influence Bayer's pricing structure." (Pet. App. 14a.) But the facts that Bayer increased list prices in 1992, notwithstanding a concern by Rockwood about Bayer doing so, and that Bayer rather than Lansco initiated negotiations in 1994, do not raise any triable question, given the substantial and undisputed evidence that Bayer set its 1981 discount levels in response to competitive offers, and regularly tested the necessity for those discounts in light of continued competitive threats as verified by Bayer.

Third, the court refers to the fact that the 1985 and 1990 Rockwood agreements contain requirements "that Rockwood provide Bayer the opportunity to match any lower price offer before Rockwood accepted such an offer." (Pet. App. 15a.) These provisions are wholly compatible with — and indeed strongly support — the conclusion based on overwhelming

Chief Executive Officer conceded in deposition his belief that Rockwood and Lansco both told Bayer that they would purchase elsewhere if Bayer did not lower its prices.[7]

The Fourth Circuit quoted at length from the Eleventh Circuit's earlier decision in *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1425-26 (11th Cir. 1990), reversing summary judgment in favor of defendant and remanding for a new trial. The court there asserted that:

> under summary judgment involving section 2(b) a legal conclusion that the meeting competition defense has been established is rarely, if ever, reachable. Even in the absence of "allegations to the contrary" that tend to refute the establishment of the defense, certain factors combine to force section 2(b) issues to trial.

Id. at 1425. Indeed, in language quoted by the court below, the Eleventh Circuit stated that "the test for establishing the § 2(b) defense makes the removal of genuine doubt well nigh impossible." *Id.*; Pet. App. 7a.

On the other side of this issue are decisions of the Fifth and Seventh Circuits, which have granted summary judgment on the meeting competition defense when the defendant presented uncontested evidence of its good faith intent in meeting a competitor's prices and the plaintiff failed to present evidence that contradicted defendant's evidence or suggested other plausible motivations. In one of the leading cases, *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (9th Cir. 1992), which the Fourth Circuit attempted to distinguish, the Seventh Circuit held that the defendants were

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facts that Bayer was strongly motivated to secure business by meeting competition wherever possible.

[7] This testimony appears in the Joint Appendix filed in the Fourth Circuit, at JA 498-99.

entitled to the meeting competition defense as a matter of law. Applying factors set forth in *United States v. United States Gypsum Corp.*, 438 U.S. 422, the Seventh Circuit recognized that "certain characteristics of the 'meeting competition' defense discussed previously make application of these summary judgment criteria somewhat more judicially manageable than might be the case in other contexts. . . . Reliance on such pragmatic criteria makes assessment of the defense considerably easier than it might otherwise be." *Reserve Supply*, 971 F.2d at 42-43. These pragmatic criteria include:

> (1) whether the seller had received reports of similar discounts from other customers, (2) whether the seller was threatened with a termination of purchases if the discount were not met, (3) whether the seller made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data, and (4) whether the seller had past experience with the buyer.

Id. at 42 (citing *United States Gypsum*, 438 U.S. at 454-55). These factors, all of which were present in this case, provide a reasoned and practical basis for establishing the seller's good faith intent in meeting competition and make summary judgment proper when there is no significant probative evidence to suggest otherwise.

Likewise, in *Jones v. Borden Co.*, 430 F.2d 568, 573 (5th Cir. 1970), the Fifth Circuit affirmed summary judgment, finding that the seller "carr[ied] its burden of showing good faith in its conclusion that it must lower its prices to meet the competition." Recognizing that other Fifth Circuit cases reject "summary judgment in cases 'where motive, intent, subjective feelings and reactions, consciousness and conscience [are] to be searched,'" *id.* at 574 (quoting *Alabama Great Southern R.R. v. Louisiana & Nashville R.R.*, 224 F.2d 1, 5 (5th Cir. 1955)), the court looked to the text of Rule 56(f) and

determined that "in the absence of any evidence to question or contradict Borden's good faith, we conclude that the district court properly granted the [summary judgment] motion." *Id.* *See Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (granting judgment as a matter of law in favor of defendant on meeting price defense because "a 'reasonable and prudent man' would conclude that [the defendant] adopted [its competitor's] price list as a reasonable method of meeting the lower price of its competitor," and there was no significant conflicting evidence); *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332, 1339-40 (S.D. Ala. 1972) (evidence incontrovertibly established meeting competition defense and defendant granted summary judgment), *aff'd without op. sub nom. Harrelson v. Texaco*, 486 F.2d 1400 (5th Cir. 1973). *See also Cadigan v. Texaco, Inc.*, 492 F.2d 383, 387 (9th Cir. 1974) (granting summary judgment and noting that although "there may be cases in which the requisite good faith is lacking because the competitor's lower price is met primarily in order to drive a retailer out of business," the plaintiffs presented no evidence of an anti-competitive intent sufficient to defeat summary judgment and the court granted judgment); *but cf. William Inglis & Sons Baking Co.*, 668 F.2d at 1047 (denying JNOV for defendant based on meeting competition defense, when defendant's "failure to employ verification procedures" was "not inconsistent with" a different actionable intent).

B. Numerous Decisions Of This Court Indicate That Summary Judgment Should Be Entered For Defendant On The Section 2(b) Defense, When The Evidence Shows That Defendant Acted Reasonably With The Intention To Meet Competition, And Plaintiff Fails To Substantially Controvert That Showing

The Fourth Circuit's decision all but foreclosing summary judgment for defendants on the meeting competition defense is

in substantial tension with several decisions of this Court construing Section 2(b), and also with this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), concerning the availability of summary judgment in a case in which intent is in issue.

As this Court first recognized in *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. at 759-60, the meeting competition defense "requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." This standard has been applied by this Court numerous times. In *United States Gypsum*, this Court, applying the above-quoted standard, identified objective factors that can be used to determine the seller's good faith under Section 2(b). 438 U.S. at 454-55. Those factors were applied by the district court here. (Pet. App. 26a, 35a-36a, 42a.)

In *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 82, this Court applied the "reasonable and prudent person" test in a case in which the lower court had not yet even addressed whether the defendant had a valid defense under Section 2(b). Viewing the evidence in the record, and informed by a common sense awareness of marketplace behavior, the Court held that "[u]nder these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet its competition, and therefore was entitled to a meeting-competition defense." *Id.* at 84. Tellingly, the Court saw no need to remand for resolution of issues of credibility and intent in the face of objective evidence showing a purpose to meet competition.

Most recently, in *Falls City*, in rejecting several proffered obstacles to the availability of the defense, this Court noted that "[u]nless the circumstances call into question the seller's good faith, [the seller's burden of proof under Section 2(b)] will be discharged by showing that a reasonable and prudent

businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available." 460 U.S. at 451. Thus, absent contrary evidence of intent, objective evidence of a good faith effort to meet competition will establish the defense for purposes of summary judgment.

This conclusion is fully supported by this Court's decision in *Matsushita*, addressing the availability of summary judgment in the context of a claimed conspiracy to engage in predatory pricing. There, in holding the entry of summary judgment for defendant to be appropriate, even though the defendant's intent was in issue, the Court said that "if the factual context renders respondents' claim implausible — if the claim is one that simply makes no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587. Thus, finding that the evidence failed to establish any plausible motive for the alleged conspiracy and that the evidence of the defendants' conduct was equally consistent with other plausible (and lawful) explanations, this Court concluded there was insufficient evidence to create a genuine issue for trial. *See also First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 284 (1968) (summary judgment proper on antitrust claim because evidence of conspiracy was insufficient to raise genuine issue of material fact in light of other evidence of defendant's motive for challenged conduct). Thus, the mere presence of an intent issue does not preclude summary judgment when the substantial and uncontroverted evidence shows that the defendant responded in good faith to meet competition.

Commentators similarly have advocated the use of summary judgment when the uncontested objective evidence establishes a good faith intent to meet competition. As noted antitrust authority Herbert Hovenkamp recognized:

> A few decisions indicate that this burden [of proving the meeting competition defense] operates so as to make it far more difficult or perhaps even impossible for the defendant to win a motion for summary judgment. In general, the argument is that 'good faith' is a matter of subjective intent that can be evaluated only by a jury's hearing of the witnesses. But this confuses good faith with the evidence by which good faith can be established. Summary judgment is proper whenever the record fails to show that certain facts are really in dispute. . . . [Absent evidence that] impeaches [defendant's] evidence or undermines its credibility, . . . summary judgment is as proper here as on any other antitrust issue.

XIV Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶2352h (1999) (footnotes omitted). *See also* Robert T. Joseph & Blake L. Harrop, *Proof of the Meeting Competition Defense: Investigation and Verification of Reported Competing Offers*, 62 ANTITRUST L.J. 127, 141 (1993) (explaining that, if proper evidentiary foundation is built, summary judgment is available on meeting competition defense).

For all of these reasons, the restrictive standard applied by the Fourth Circuit to the meeting competition defense on summary judgment is improper.

III. THE FOURTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THE MEETING COMPETITION DEFENSE WILL IMPEDE COMPETITION, THEREBY HARMING BOTH BUSINESSES AND CONSUMERS, BY CHILLING THE USE OF COMPETITIVE PRICING SCHEDULES

The Robinson-Patman Act amended the Clayton Act in 1936 to protect small businesses from the claimed market power of large businesses, such as chain stores, which threatened the existence of independent stores. United States Department of

Justice, Antitrust Division, Report on the Robinson-Patman Act 1 (1977). The Act, however, may at times conflict with the basic antitrust policy of fostering competition. *See generally id.* at 37-99, 149-250. This Court has recognized that "the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition among sellers." *Great Atlantic & Pacific Tea Co*, 440 U.S. at 83 n.16. By contrast, the Fourth Circuit's interpretation of Section 2(b) would chill competition in two significant ways.

First, by narrowing Section 2(b) to "'individual competitive situations,'" and applying it only when a defendant can show that enforcement of the statute will have a "*direct* anti-competitive effect" (Pet. App. 9a, 10a), the Fourth Circuit virtually forecloses the use of competitive pricing schedules available over a period of time in response to competitive offers that are widely available. Inherent in the use of any such schedule is its general application to some geographic area, to some particular customers, and/or over a specified period of time. While such general applicability is necessary to provide certainty and predictability in the distribution of products, discounts offered on such a basis seem clearly inconsistent with the Fourth Circuit's holding.[8] This result is contrary to Congress' intent. As this Court has made clear, Section 2(b)

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[8] In this case, Bayer relied on a volume discount schedule to determine prices available under long-term contracts with individual customers, when Bayer believed that lower prices were otherwise available on a continuing basis to those customers. Even though Bayer closely monitored the continued availability and pricing of generally comparable products to Rockwood and Lansco, the court found the evidence legally insufficient. *A fortiori*, that conclusion logically precludes application of the defense to generic price schedules, applicable to multiple customers within a particular geographic area, absent specific information on competitive prices offered to each customer at each point in time. This Court, in *Falls City*, reached the opposite conclusion. 460 U.S. at 448.

should be interpreted to enhance the competitive process: "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951). *See also Great Atlantic & Pacific Tea Co.*, 440 U.S. at 83 n.16 (recognizing potential conflict between the impact of Robinson-Patman and the goals of the Sherman Act); *United States Gypsum*, 438 U.S. at 450 (same).

Second, under the Fourth Circuit's decision summary judgment for the defendant on the meeting competition defense will be virtually or entirely unavailable. Sellers will therefore be discouraged from engaging in conduct that will require justification under that defense, given the resulting likelihood of protracted litigation whose prohibitive costs may well outweigh the benefits of this type of competitive behavior. Thus, Congress' goal in enacting the Section 2(b) affirmative defense — to encourage vigorous competition — would be thwarted by the Fourth Circuit's restrictive application of summary judgment principles to the meeting competition defense. When the evidence establishes a genuine issue as to the defendant's intent in adopting a pricing schedule, the matter should be resolved at trial. However, when no such issue exists and the evidence establishes defendant's undisputed good faith intent to meet competition, summary judgment is appropriate and will facilitate efficient use of judicial resources.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOOVER COLOR CORPORATION,
Plaintiff-Appellant,
v.
BAYER CORPORATION,
Defendant-Appellee.

No. 98-2238.

Argued: Sept. 22, 1999
Decided: Dec. 3, 1999

Before WILKINS, WILLIAMS, and MOTZ, Circuit Judges.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A buyer of synthetic iron oxide pigment brought this action asserting that the company selling the pigment engaged in discriminatory pricing in violation of the Robinson-Patman Act. The district court found that the seller established an affirmative defense by demonstrating that it set its prices in a good faith attempt to meet competition in the marketplace and, therefore, granted the seller summary judgment. This "meeting competition" defense, however, requires proof of a good faith response not just to general competition in the market-place, but to the "equally low price of a competitor." Because disputed facts remain as to whether the seller's prices were the result of a good faith attempt to meet a competitor's prices, we reverse and remand for further proceedings.

I.

Hoover Color Corporation is one of several primary distributors of Bayferrox, a synthetic iron oxide pigment used to color paint, plastics, and building and concrete products. Hoover filed this suit against the producer of Bayferrox, Bayer Corporation, for price discrimination under the Clayton Act, as amended by the Robinson-Patman Anti-Discrimination Act, 15 U.S.C. § 13 (1994). Section 2(a) of the Robinson-Patman Act provides in pertinent part:

> It *shall be unlawful* for any person engaged in commerce, in the course of such commerce, either directly or indirectly, *to discriminate in price between different purchasers of commodities* of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where *the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

15 U.S.C. § 13(a) (emphasis added).

Hoover alleges that Bayer discriminated in favor of its large distributors of Bayferrox, in violation of the Robinson-Patman Act, by implementing a volume-based incentive discount pricing system. Under this system, the price each distributor paid for Bayferrox depended on the total amount of the product it purchased. Hoover, which purchased substantially smaller quantities of Bayferrox than either of its two competitors — Rockwood Industries and Landers-Segal Company (Lansco) — paid significantly more for the Bayferrox

than its competitors. For example, in 1992, Bayer discounted Hoover's comparatively small 2.6 million pound purchase of Bayferrox by only 1% off the distributor market price; but Lansco, by purchasing 13.3 million pounds of Bayferrox, received a 6% discount and Rockwood, by purchasing 27.1 million pounds, received the equivalent of an additional 4% discount beyond Lansco's. In addition, the prices Bayer charged Rockwood also might be reduced if Rockwood presented Bayer with lower price offers from other sellers and Bayer chose to meet those offers. In fact, from 1985 until 1994, the Rockwood-Bayer agreements required Rockwood to present to Bayer any lower offers it received from other reputable producers; only if Bayer did not match the price within 14 days did Rockwood have the option of purchasing from the alternate producer. No distributor knew of these or any other provisions in its competing distributors' contracts.

For invoicing purposes, the prices paid by each distributor were based on the volume purchased the previous year. If a distributor bought more or less Bayferrox than it had the previous year (thus entitling it to a different discount), Bayer did not charge or refund the difference to the distributor until the end of February of the following year. Hoover claims that, particularly because of the year delay in obtaining the benefit of a greater volume purchase, the lower prices offered to its larger competitors were not functionally available to it even if the same prices were theoretically available to all distributors.

Bayer instituted its system of volume-based incentive discounts in 1980. At that time, Bayer was building a large manufacturing plant in New Martinsville, West Virginia, which it completed at the end of 1980. Hoover maintains that Bayer pursued its volume-based pricing strategy, which assertedly substantially lessened competition among Bayferrox distributors and unfairly injured Hoover, in order to obtain the bulk orders necessary to make profitable the New Martinsville plant, with its attendant high fixed costs.

The district court granted Bayer's motion for summary judgment. The court found that the "uncontroverted evidence . . . establishe[d] that Bayer offered its lower prices to Rockwood and Lansco out of a good faith competitive necessity to meet competition for their business," thus meeting the requirements for an affirmative defense under § 2(b) of the Robinson-Patman Act. Section 2(b) provides:

> [N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b).

Hoover appeals.

II.

Congress enacted the Robinson-Patman Act to prevent a large buyer from "secur[ing] a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability." *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

Originally, the Clayton Act had provided that "nothing contained in it should prevent discrimination in price . . . on account of differences in . . . quantity of the commodity sold." *Id.* (internal quotation marks omitted). The original Clayton Act had also "allowed as one defense a demonstration that the price concession was 'made in good faith to meet competition.'" *FTC v. Sun Oil Co.*, 371 U.S. 505, 516 (1963) (*quoting* 38 Stat. 730 (1914)). After some years under this statutory regime, Congress determined that the protection afforded small buyers was "'inadequate, if not almost a nullity.'" *Morton Salt*, 334 U.S. at 43 (*quoting* H.R. Rep. No. 74-2287, at 7 (1936)). Accordingly, Congress passed the

Robinson-Patman Act, which amended the Clayton Act "to limit 'the use of quantity price differentials to the sphere of actual cost differences,'" *id.* (*quoting* H.R. Rep. No. 74-2287, at 9 (1936)), and to limit the meeting competition defense "to protect only [price] discriminations made 'to meet an equally low price of a competitor.'" *Sun Oil*, 371 U.S. at 517.

The Robinson-Patman Act thus seeks to increase competition by regulating large buyers' economic power. When one or a few large buyers dominate a market in which many suppliers compete for sales, these buyers can, if unrestrained, force the suppliers to sell at such low prices as to prevent new buyers from entering the market. Section 2(a) of the Act prohibits this. But because § 2(a) does not confine its ban on price discrimination to those situations in which the desire for increased competition would justify legal constraints, Congress provided sellers with the § 2(b) "meeting competition" affirmative defense (albeit in a more limited form than in the original Clayton Act).

This scheme has not enjoyed wide approval. Indeed, professional and academic opinion has "almost uniformly condemned" the Robinson-Patman Act. *See, e.g.*, Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 1 (1976). Criticism has ranged from its drafting, *see Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 65 (1953) (Frankfurter, J.) (noting that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act"), to its underlying rationale, *see* Robert H. Bork, *The Antitrust Paradox* 382 (1978) (describing the Robinson-Patman Act as "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory"). We must nonetheless attempt to interpret and apply the Robinson-Patman Act, whatever its faults, as written and intended by Congress.

The Supreme Court has provided us with substantial guidance in this pursuit. The Court has explained that to

establish a prima facie case of price discrimination under § 2(a), a plaintiff must prove: (1) a seller sold the same product at different prices to different purchasers, *see FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), and (2) such differences in price reasonably may cause an injury to competition. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). A plaintiff may demonstrate the first element — the price difference — through evidence of volume-based discounts that are theoretically, but not functionally, available to all buyers. *See Morton Salt*, 334 U.S. at 42. The second element — possible injury to competition — so obviously follows from the first that it "is established prima facie by proof of a substantial price discrimination between competing purchasers over time." *Falls City*, 460 U.S. at 435; *see also Morton Salt*, 334 U.S. at 50 ("It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.").

If a buyer makes out a prima facie case of price discrimination under § 2(a), a seller can nonetheless avoid liability under § 2(b) if it can demonstrate that it set its prices in a good faith attempt to meet "an equally low price of a competitor." 15 U.S.C. § 13(b). This affirmative defense "requires more than a showing of facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor." *Falls City*, 460 U.S. at 439. Rather, to establish the defense, a seller must also prove that "the 'lower price . . . *was made* in good faith *to meet*' the competitor's low price." *Id.* (*quoting* 15 U.S.C. § 13(b)) (emphasis added by Supreme Court). Good faith is at the heart of the defense, and good faith "'is a flexible and pragmatic, not technical or doctrinaire, concept. . . . Rigid

rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.'" *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978) (*quoting Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963)).

Because of this emphasis on intent and good faith and because the seller has the burden of proving the affirmative defense, courts have rarely granted a seller judgment as a matter of law on the basis of the defense. As the Eleventh Circuit recently explained:

> [A] legal conclusion that the meeting competition defense has been established is rarely, if ever, reachable. . . . [I]n the normal course of affairs the summary judgment movant does not bear the burden of proof at trial. Here our movant does, for the statute places the burden of establishing the defense on the [defendant] not the [plaintiff]. As is well established, in a summary judgment proceeding the party against whom the burden of proof falls at trial faces a challenge more difficult than otherwise. . . . Here the appellees must do more than put the issue into genuine doubt; indeed, they must remove genuine doubt from the issue altogether. Second, the test for establishing the section 2(b) defense makes the removal of genuine doubt well nigh impossible. The test for establishing the defense is particularly fact bound. . . . As the standards suggest, these facts are more attuned with a jury's discovery capabilities than a judge's, particularly so in a complex antitrust context like the present one. Furthermore, the concept of good faith lies at the core of the defense. Like the concept of "good faith" in other legal standards, the concept here concerns itself with the belief of those invoking its protection. Thus, issues of credibility are inherently bound up with a decision on the

section 2(b) defense and in a summary judgment proceeding, of course, issues of credibility are beyond a judge's ken.

Altogether, these factors weigh heavily against any attempt to dispose of section 2(b) issues on summary judgment.

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1425-26 (11th Cir. 1990) (citations and quotation marks omitted); *see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1048 (9th Cir. 1981) (holding that even an "admittedly small doubt" that a seller's price reductions were a good faith response to competition required reversal of the district court's judgment as a matter of law to the seller), *cert. denied*, 459 U.S. 825 (1982).

III.

Notwithstanding the heavy burden imposed on a seller attempting to obtain summary judgment on the basis of the meeting competition defense, the district court found that Bayer had met that burden here. After assuming, without deciding, that Hoover had made out a prima facie case of price discrimination under § 2(a), the district court concluded that Bayer had established its entitlement to the affirmative defense in § 2(b). The following footnote from the district court's opinion reflects its approach:

The meeting competition defense permits exactly what § 2(a) was amended to prohibit: large purchasers using their greater purchasing power to force sellers to sell their goods to the large purchasers at prices lower than the sellers sell to small purchasers. It seems to me, that in a case such as the one at bar, where the seller can document competition in the market and the threat of reduced sales as a result of that competition, Congress' goals in passing Robinson-Patman are effectively circumvented and the seller necessarily can not be held liable for price discrimination.

If a seller could prove the meeting competition defense under the Robinson-Patman Act by "document[ing] competition in the market and the threat of reduced sales as a result of that competition," as the district court believed, we would agree that indisputably Bayer has established the defense in this case. Such a standard, however, would enable nearly all sellers to demonstrate that they price their goods or services in response to competition in the market. Most markets are competitive and pricing is therefore almost always driven by considerations of competitive pressures, whether from direct competitors who provide a highly similar good or from those who provide a suitable substitute.

Therefore, if § 2(b) of the Robinson-Patman Act provided a defense to every seller who could document a good faith attempt to meet general competition in the market place, then the defense would, as the district court recognized, virtually obliterate the protection Congress sought to provide buyers in § 2(a) of the Act. We need not consider whether anything would be left of § 2(a)'s ban on discriminatory pricing under such a statutory scheme because, although Congress provided a generous defense in § 2(b), that defense is considerably more limited than the district court acknowledged. Indeed, as noted above, the original Clayton Act provided a broad meeting competition defense very similar to that envisaged by the district court; however, Congress specifically passed the Robinson-Patman Act to amend the Clayton Act and circumscribe that defense. *See Sun Oil*, 371 U.S. at 516-17.

In § 2(b), as amended, Congress provided sellers a defense when that prohibition would have a *direct* anti-competitive effect. Section 2(b) provides a seller no defense from § 2(a)'s ban on discriminatory pricing when that pricing is based on general competition in the market, but affords a seller an absolute affirmative defense when its prices are set "in good faith to meet an equally low price *of a competitor* or the

services or facilities furnished *by a competitor*." 15 U.S.C. § 13(b) (emphasis added).

Moreover, the Supreme Court has made it plain that § 2(b) must be applied in accordance with its literal language and is not to be interpreted more expansively. The Court has repeatedly emphasized the necessity of proof of a good faith attempt to match an individual competitor's price. For example, in *FTC v. A.E. Staley Mfg. Co.*, the Court explained that to avoid liability under the § 2(b) "meeting competition" defense, the seller must "at least" show that its "price was made in good faith to meet a competitor's" and that a reasonable person would believe that "the granting of a lower price would in fact meet the equally low price of a competitor." 324 U.S. 746, 759-60 (1945); *accord Falls City*, 460 U.S. at 438; *Gypsum*, 438 U.S. at 451. Hence, the Court itself has recognized that § 2(b) "places emphasis on individual competitive situations, rather than upon a general system of competition." *Staley Mfg.*, 324 U.S. at 753.

To be sure, a seller can establish that it acted in good faith to meet a competitor's price by "efforts falling short of interseller verification." *Gypsum*, 438 U.S. at 454. For example, a seller can rely on evidence that it received "reports of similar discounts from other customers," or that it "was threatened with termination of purchases if the discount were [sic] not met." *Id.* at 455. A seller can also demonstrate its good faith by showing that it acted to "corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data," or that it relied on "past experience with the particular buyer in question." *Id.* Moreover, proof of "[a] good faith belief, rather than absolute certainty" is all that is necessary. *Id.* at 453. But, in order to avail itself of the defense a seller must, in the final analysis, demonstrate to the satisfaction of "a reasonable and prudent person" that it offered a lower price with a good faith belief that "the granting of a lower price

would in fact meet the equally low price of a competitor." *Staley Mfg.*, 324 U.S. at 759-60.

The question before us then is whether the uncontroverted evidence establishes that Bayer set its volume-based discount prices in a good faith effort to meet an equally low price offered by a competitor.

IV.

Bayer claims that undisputed evidence does establish that the volume discounts "were a good faith response to competitive offers that were available to [its] distributors." Brief of Appellee at 38. Bayer relies on three kinds of evidence to support its assertion of the defense.

First and principally, Bayer relies on evidence that the market for iron oxides was apparently very competitive. For example, in 1992 Rockwood's parent company purchased a potential competing supplier of synthetic iron oxides, thereby decreasing Rockwood's demand for Bayferrox and increasing its market power against Bayer. Moreover, imported goods from China, Mexico, India, Austria, and elsewhere provided distributors with lower-cost alternatives to Bayferrox. Given these available alternatives and the competitive market for iron oxides, Bayer argues that Rockwood and other distributors would purchase more iron oxide pigments from Bayer if the price were lower, and less if the price were higher. This evidence undoubtedly demonstrates the generally competitive nature of the iron oxide market, but it says nothing about actual or imminent lower price offers made by Bayer's competitors and matched by Bayer with its volume discount pricing structure. The fact that a market may have been "intensely competitive" in no way precludes a determination that the seller may have violated the Robinson-Patman Act. *See William Inglis*, 668 F.2d at 1046-47.

Bayer also relies on two specific instances in which Rockwood and Lansco presented it with lower prices from a

competitor and asked Bayer to meet those prices. This evidence also fails to prove Bayer's entitlement to the meeting competition defense. Although it may well establish that Bayer's distributors twice received lower price offers from other suppliers and sought to have Bayer match such offers, the evidence cannot establish that Bayer set its prices "to meet" a competitor's lower price because Bayer expressly refused to meet the competitor's lower prices on both occasions. Because Bayer did not match either offer, Bayer cannot rely on these threats to establish incontestably that its volume discounts constituted a "good faith" attempt "to meet an equally low price of a competitor." 15 U.S.C. § 13(b).

Finally, Bayer presents statements from Rockwood and Lansco that they would purchase less Bayferrox if Bayer did not reduce its prices. Such evidence may well establish the existence of a competitor's offer, or threatened offer, to which Bayer reasonably responded by increasing its prices. *See Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 74 (1979) (holding that seller proved meeting competition defense by producing evidence during FTC factfinding hearing that it lowered its price in response to a statement by a large, long-time buyer that seller's bid was far "out of line" with "a [competitor's] bid in [the buyer's] pocket.").

Bayer's evidence, at least at this juncture, however, is considerably less compelling than that in the case on which Bayer so heavily relies — *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.* — one of the very few instances in which a court has upheld summary judgment to a seller on the basis of the meeting competition defense. 971 F.2d 37 (7th Cir. 1992). In *Reserve Supply*, the defendant sellers offered substantial evidence that a customer, or potential customer, asked them to match a price offered by one of the sellers' competitors. *See id.* at 44. Furthermore, the sellers demonstrated that, pursuant to their established practices, they had compared the lower price offers to other reports of

competitive prices in the marketplace to substantiate the bona fides of these offers before acting to meet the competitors' prices. *See id.* Again, Bayer has offered no evidence equivalent to that offered by the sellers in *Reserve Supply*.

Moreover, and perhaps more importantly, Hoover has proffered significant and direct evidence which, if believed, could rebut Bayer's assertion of the § 2(b) defense. This evidence also distinguishes the present case from *Reserve Supply*, in which the plaintiffs proffered no direct evidence to rebut the sellers' proof that they matched specific competitive offers. Hoover first points to evidence related to a possible alternative motive for Bayer's volume-based discount pricing system. Hoover offered undisputed evidence that Bayer wanted to maintain a high volume of business in Bayferrox to make cost effective its large plant in New Martinsville. Indeed, several of Bayer's own executives so testified. For example, one explained that "the spirit behind all of these volume-based contracts was to begin to load the facility that we had just built" and affirmed that this goal continued through 1997. Another executive similarly testified that "the intent [of the volume-based discounts] . . . was to offer a structure that would give [Bayer] the volume utilization of the [New Martinsville] plant." Hoover maintains that this evidence demonstrates that Bayer's sole motive in using volume discount pricing was not to meet a competitor's price, but rather to develop the large volume of sales necessary to utilize the New Martinsville plant profitably.

Bayer acknowledges, as it must, that *one* of the reasons it engaged in volume discount pricing was to keep the New Martinsville plant increasingly active. Bayer asserts, however, that "[t]here is . . . no inconsistency" between its need to increase volume for the New Martinsville plant and its claim that volume discount pricing was simply a "respon[se] to the competitive offers." Although this assertion is true, it lends little support to Bayer's § 2(b) defense. Although increasing

volume and responding to competitive offers are potentially consistent, they are not necessarily consistent. A seller's attempt to set prices in order to satisfy the high volume necessary to operate its plant successfully certainly does not establish that it also set prices in a good faith effort to meet a competitor's prices, and Bayer must prove the latter. On the present record, in view of the evidence as to the New Martinsville plant and its impact on Bayer's business, a fact-finder could reasonably conclude that Bayer engaged in volume discount pricing not to match a competitor's prices but simply to grow its business with the kinds of "aggressive price reductions condemned by the Robinson-Patman Act." *William Inglis*, 668 F.2d at 1047.

Hoover also proffered evidence that the threats Bayer received from its larger distributors — that they would purchase less Bayferrox if no price reduction was forthcoming — may not have played a role in motivating Bayer's volume discounts. In his deposition testimony, Rockwood's president stated that Bayer "minimized" Rockwood's repeated general warning about the availability of lower-priced alternatives to Bayferrox and "didn't give [the warning] a lot of credibility." Bayer "basically said [substitution of lower priced imported iron oxide pigments] wasn't that big a concern." Hoover also points to the fact that Bayer, not Lansco, initiated negotiations for the 1994 Bayer-Lansco agreement. A possible inference from this uncontroverted fact is that Lansco did not have a lower offer from a competitor to motivate renegotiation of its contract with Bayer to obtain more favorable terms. A factfinder need not, but reasonably could, conclude that this undisputed evidence indicates that the threats of Bayer's distributors to change suppliers did not influence Bayer's pricing structure.

Furthermore, provisions in the 1985 and 1990 Rockwood-Bayer agreements lend additional support for the possible conclusion that Bayer did not create the volume-based discount

pricing system to match the offers of a competitor. These agreements contain, in addition to the provision for volume discounts, a separate express requirement that Rockwood provide Bayer the opportunity to match any lower price offer before Rockwood accepted such an offer. Thus, wholly apart from the volume-based discounts, the contracts provide an explicit mechanism for Bayer to receive and match competing offers. Given this evidence, a factfinder could reasonably determine that Bayer did not need or intend the volume discounts to match competing offers.

For the foregoing reasons, we must conclude that at this juncture Bayer has not demonstrated its entitlement as a matter of law to the "meeting competition" defense. Accordingly, we reverse the district court's grant of summary judgment to Bayer on this basis. We note that because the district court assumed without deciding that Hoover made out a prima facie case of price discrimination under § 2(a), it did not reach any of Bayer's alternative arguments. We similarly do not reach those arguments and express no opinion as to their validity.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA,
ROANOKE DIVISION.

HOOVER COLOR CORPORATION, Plaintiff,
v.
BAYER CORPORATION, Defendant.

No. Civ.A. 98-0841-R.

July 30, 1998.

MEMORANDUM OPINION

KISER, Senior District Judge.

This case involves a claim of price discrimination in violation of the Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C.A. § 13(a)). Before me now is defendant's motion for summary judgment. The parties have fully briefed the issues involved, and have presented oral argument. The motion is, therefore, ripe for disposition. For the reasons contained herein, defendant's motion for summary judgment is GRANTED.

BACKGROUND

Bayer [formerly known as Miles; formerly known as Mobay] produces and sells synthetic iron oxide pigments under the trade name "Bayferrox." Bayferrox is used in various segments of the pigment industry, but primarily in the construction products segment, the coatings segment, and the plastics segment.[1] Bayer sells Bayferrox directly to end-users.

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[1] This case primarily concerns the construction products and coatings segments. Rockwood was recognized as the leading distributor in the

During the time of the alleged price discrimination, Bayer also sold Bayferrox to distributors who then resold the Bayferrox to subdistributors and end-users. Hoover Color Corporation, Rockwood Industries [also known as Davis Colors; also known as Mineral Pigments],[2] and Landers-Segal Color Company [hereinafter Lansco] were distributors of Bayferrox.

Hoover claims that, from 1992 through 1996, Bayer sold Bayferrox to Rockwood and Lansco at lower net prices per pound than to Hoover.[3] These lower prices occurred as a result of a volume discount schedule which Bayer has included in its distributor contracts since 1980.[4] All three distributors

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construction segment, although it participated in all three segments. Lansco participated in all segments as well, although it was much smaller than Rockwood. Hoover was, by far, the smallest of the three distributors. It primarily was involved in the coatings segment, although it did have a presence in the construction products segment.

[2] Davis Colors handled Rockwood's sales in the construction products segment; Mineral Pigments handled Rockwood's sales in the coatings segment. Paris Affidavit at ¶ 8.

[3] In its Complaint, Hoover sought damages for discriminatory pricing from January 1, 1982 until September 23, 1992 (Count I), from September 23, 1992 until September 23, 1996 (Count II), and for prospective discriminatory pricing from September 23, 1996 until March 1, 1998. By Order entered July 24, 1997, I limited any prospective recovery by Hoover to the period after September 23, 1992 because of the four year statute of limitations. Additionally, Hoover concedes that no damages could have occurred after December 31, 1996, since Hoover was the only distributor after that date.

[4] Rockwood and Bayer entered into the first contract with a volume discount schedule in 1980. That same basic volume discount schedule was provided to Lansco and Hoover in 1981, although Lansco and Hoover purchased at far lower volumes than Rockwood.

Rockwood and Bayer renegotiated their contact in 1985. This volume discount schedule was provided to Lansco and Hoover in 1987. Again, however, Lansco and Hoover purchased less Bayferrox than Rockwood.

purchased under the same basic discount schedule. Rockwood and Lansco purchased higher volumes of Bayferrox than Hoover, thus, they were able to obtain the pigment at a lower net price per pound. Hoover contends that, by way of the operation of the discount mechanism, the prices paid by Rockwood and Lansco, while theoretically available to all distributors, were functionally available only to Rockwood and Lansco.

Under the discount mechanism, a distributor's price per pound of Bayferrox for a given year was set at the beginning of that year.[5] A distributor's discounted price for the given year was based upon the amount of Bayferrox purchased by the distributor during the previous year. If the distributor actually purchased more in the given year than it had in the previous year, then Bayer would reimburse the distributor for the amount of discount actually earned. The reimbursement would be paid by March of the next year. If the distributor purchased less than had been anticipated, however, it would have to return a portion of the estimated discount to Bayer.

For example, if Hoover had purchased four million pounds of Bayferrox in 1988, then it would have received the corresponding two percent discount in 1989.[6] If Hoover

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Rockwood and Bayer renegotiated their contract again in 1990 and 1994, and both times the price per pound increased. This same basic volume discount schedule also was provided to Lansco in 1994. Hoover never purchased under the terms of the latest discount schedule. Even though Rockwood's and Lansco's price per pound increased in 1994, their higher volume allowed them to continue to purchase Bayferrox at a lower price than Hoover.

[5] The price per pound was the published list price for the Bayferrox, minus a standard discount provided to all distributors, minus the estimated volume discount to be earned by each distributor.

[6] The figures in this example are based upon the discount schedule included in the 1987 Bayer-Hoover Agreement.

bought six million pounds in 1989, then by March of 1990, it would be reimbursed the difference between the 2% discount Bayer estimated Hoover would earn and the 3% discount Hoover actually earned. If, however, Hoover only purchased two million pounds, then it would be required to reimburse Bayer for its failure to purchase sufficient Bayferrox to earn the 2% discount.

Hoover claims that the discount mechanism prevented uniform pricing at the beginning of each year. According to Hoover, the fact that it would not receive a rebate on its discount for fifteen months prohibited it from purchasing an increased volume of Bayferrox. In other words, Hoover contends that the method of setting a discount for a given year based on the volume purchased in the prior year rendered the higher volumes functionally unavailable to Hoover and, thereby, denied Hoover the opportunity to purchase at the same price as Lansco or Rockwood.

DISCUSSION

Hoover brings this action for price discrimination under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. That section provides as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or

> knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

15 U.S.C.A. § 13(a).

A plaintiff must prove several elements to hold a seller liable for price discrimination under § 2(a). First, the seller must be "engaged in commerce," the price discrimination must occur "in the course of such commerce," and at least one of the sales constituting the discrimination must occur "in commerce." Second, the discrimination must involve contemporaneous "sales" to two or more purchasers at different prices. Third, the items sold must be "commodities of like grade and quality." Fourth, there must be a reasonable possibility that the discriminatory prices will substantially lessen competition, or injure, destroy, or prevent competition. Additionally, in order to recover damages under § 4 of the Clayton Act, a private plaintiff who has proved a violation of § 2(a) must also demonstrate that it suffered actual injury to its business or property as a result of the price discrimination. *See, e.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990) (listing requirements for prima facie case); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-38 (1983) (discussing § 2(a) damages); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981) (discussing requirement of § 4 actual antitrust damages).

Bayer brings the present motion for summary judgment. For the purposes of this motion, Bayer admits that: (1) Bayferrox is a commodity; (2) Bayer sold Bayferrox in interstate commerce to Rockwood, Lansco, and Hoover; (3) the Bayferrox sold to Rockwood, Lansco, and Hoover was of like grade and quality; and (4) Bayer contemporaneously sold Bayferrox to Rockwood, Lansco, and Hoover at different prices.

In its motion, Bayer argues that Hoover has failed to put forward any evidence to support its damages claims. First,

Bayer contends that Hoover's evidence fails to demonstrate that the price differentials had any reasonable possibility of substantially injuring competition under § 2(a). Second, Bayer contends that even if Hoover could establish a violation of § 2(a), Hoover produced no evidence that its business or property has suffered a § 4 injury as a result of the price differential.

In addition to challenging Hoover's ability to establish a prima facie claim of price discrimination, Bayer asserts that it has established two affirmative defenses, either of which would defeat plaintiff's claim. First, Bayer asserts that the lower prices for Rockwood and Lansco were legal under § 2(b) because they were "made in good faith to meet an equally low price of a competitor. . . ." 15 U.S.C.A. 13(b). Second, Bayer asserts that Rockwood's and Lansco's prices were functionally available to Hoover since they purchased Bayferrox under the same basic discount schedule.

For the purposes of this motion, I will assume without deciding, that Hoover has come forward with sufficient evidence to state a prima facie case for price discrimination. Having assumed that Hoover has set forth a prima facie case of price discrimination, I will examine Bayer's claimed affirmative defenses. In granting the motion for summary judgment, I only need to discuss the "meeting competition" defense of § 2(b).[7]

I. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Where the record taken as a whole could not lead a rational trier of fact to

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[7] I do not decide, therefore, whether or not Hoover has put forward evidence of possible competitive injury under § 2(a) or actual antitrust injury under § 4, or whether Rockwood's and Lansco's prices were functionally available to Hoover.

find for the nonmoving party, there is no genuine issue for trial and summary judgment should be granted. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. The plaintiff is entitled to have the credibility of all his evidence presumed." *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.) (citations omitted), *cert. denied*, 513 U.S. 813, 115 S.Ct. 67, 130 L.Ed.2d 24 (1994). There is a genuine issue of fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

"While Rule 56 is to be applied to antitrust cases no differently from how it is applied to other cases, that is not to say that the summary judgment device is not an appropriate and useful tool for resolving antitrust cases. On the contrary, because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for Rule 56 utilization." *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317, 1322 (4th Cir. 1995) (citation omitted). The appropriateness of granting summary judgment on a § 2(b) defense is often debated, however. *Compare Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1425 (11th Cir. 1990) ("[U]nder summary judgment involving section 2(b) a legal conclusion that the meeting competition defense has been established is rarely, if ever, reachable.") *with Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 42-43 (7th Cir. 1992) ("[W]e must remember that courts traditionally have been quite circumspect in permitting a grant of summary judgment when claims of good faith and belief are involved—especially when the moving party has the burden of establishing that fact at trial. . . . While these latter considerations require our careful attention, we must also remember that certain characteristics of the 'meeting

competition' defense . . . make application of these summary judgment criteria somewhat more judicially manageable than might be the case in other contexts.") (citations omitted). Thus, while the posture of this case may require a harder look at the evidence presented by both sides, summary judgment remains appropriate where the facts clearly establish that the seller's lower prices were a good faith response to competition. *See Reserve Supply*, 971 F.2d at 42 (Since defendants bear burden of proving good faith at trial, they "must show that the evidence of their good faith is 'so one-sided that . . . [they] must prevail as a matter of law.'") (*quoting Liberty Lobby*, 477 U.S. at 251-52); *see also Walker v. Hallmark Cards, Inc.*, 992 F.Supp. 1335, 1340-42 (M.D. Fla. 1997) (granting summary judgment on § 2(b)); *Bryant Corp. v. Outboard Marine Corp.*, 1995-1 Trade Cas. (CCH) ¶ 70,903, 1994 WL 745159, at * 4-*6 (W.D. Wash. 1994) (same), *aff'd*, 77 F.3d 488, 1996 WL 48401 (9th Cir. 1996); *Krieger v. Texaco, Inc.*, 373 F.Supp. 108, 112 (W.D.N.Y.1972) (same); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1340 (S.D. Ala. 1972) (same), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973).

II. Meeting Competition Defense to a § 2(a) Price Discrimination Claim

Pursuant to § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, nothing "shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." 15 U.S.C.A. 13(b). The meeting competition defense "allows a seller to 'set its lower price [to a second line buyer in competition with another buyer] in good faith to meet an equally low price of [the seller's] competitor' without violating the price discrimination prohibitions of the [Robinson-Patman Act]." *Walker*, 992 F.Supp. at 1340 (brackets in original) (citation omitted). "When proved, the meeting-competition defense of § 2(b) exonerates a seller from

Robinson-Patman Act liability." *Falls City*, 460 U.S. at 438 (*citing Standard Oil Co. v. FTC*, 340 U.S. 231, 246-47 (1951)).[8]

Bayer contends that it sold Bayferrox to Rockwood and Lansco at lower prices in a good faith attempt to meet an equally low price of competitors. Bayer bears the burden of establishing this defense. *Reserve Supply*, 971 F.2d at 41 (*citing Falls City*, 460 U.S. at 451). At the summary judgment stage, "the burden in the context of the meeting competition defense is on the defendant to '*establish that the evidence supported only one reasonable conclusion — that its lower*

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[8] In passing the Robinson-Patman Act, Congress intended to limit quantity price differentials, otherwise permissible under the Clayton Act, "to the sphere of actual cost differences. Otherwise, . . . such differentials would become instruments of favor and privilege and weapons of competitive oppression." *FTC v. Morton Salt Co.*, 334 U.S. 37, 43-44 (1948) (*quoting* H.R.Rep. No. 74-2287 at 9 (1936)). This limitation on price differentials was intended to protect small purchasers from the dominant market position and purchasing power of large purchasers. *Id.* at 49 ("[I]n enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities."); *see also Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 75-76 (1979) ("The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers.").

In addition to tightening restrictions on price discriminations, however, Congress also included the meeting competition exception, which seems to swallow the rule to a great extent. The meeting competition defense permits exactly what § 2(a) was amended to prohibit: large purchasers using their greater purchasing power to force sellers to sell their goods to the large purchasers at prices lower than the sellers sell to small purchasers. It seems to me, that in a case such as the one at bar, where the seller can document competition in the market and the threat of reduced sales as a result of that competition, Congress' goals in passing Robinson-Patman are effectively circumvented and the seller necessarily can not be held liable for price discrimination. *See generally Great A & P Tea Co.*, 440 U.S. at 82-85.

prices were a good faith response to competition.'" *Zoslaw v. MCA Distributing Corp.*, 594 F.Supp. 1022, 1032 (N.D. Calif. 1984) (*quoting William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1045 (9th Cir. 1981) (emphasis in original)).

A. Applicable Standard

The Supreme Court repeatedly has addressed what a seller must prove in order to succeed with a meeting competition defense. The "meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor. . . ." *Falls City*, 460 U.S. at 451. The defense "also requires the seller to demonstrate that its lower price was a good-faith response to a competitor's lower price." *Id.*

"The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Id.* at 441 (*quoting Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963)). "Whether this standard is met depends on 'the facts and circumstances of the particular case, not abstract theories or remote conjectures.'" *Id.* (*quoting United States v. U.S. Gypsum Co.*, 438 U.S. 422, 454 (1978)). "[A] showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that lower price." *Id.* at 439.[9]

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[9] It is clear that the meeting competition defense only entails an analysis of the relevant market and the conduct of the favored purchasers, the seller, and the seller's competitor. These are analyzed to determine whether a reasonable and prudent seller would have believed that the lower price was necessary to meet competition. The defense does not entail an analysis of any alleged harm suffered by the disfavored purchaser or the seller's treatment of the disfavored purchaser.

In *Gypsum*, the Supreme Court provided a non-exhaustive list "of factors that could be relevant to determining a seller's good faith, including (1) whether the seller had received reports of similar discounts from other customers, (2) whether the seller was threatened with a termination of purchases if the discount were not met, (3) whether the seller made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data, and (4) whether the seller had past experience with the buyer." *Reserve Supply*, 971 F.2d at 42 (*citing Gypsum*, 438 U.S. at 455).

"Nothing in § 2(b) requires a seller to lower its price in order to meet competition. . . . In a period of generally rising prices, vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts. Thus, a price discrimination created by selective price increases can result from a good faith effort to meet a competitor's low price." *Falls City*, 460 U.S. at 444 (emphasis in original).

Also, "[a] seller is permitted to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers. The plain language of § 2(b) also permits a seller to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily freezing his price to his other customers." Indeed, "[t]he very purpose of the defense is to permit a seller to treat different competitive situations differently. The prudent businessman responding fairly to what he believes in good faith is a situation of competitive necessity might well raise his prices to some customers to increase is profits, while meeting competitors' prices by keeping his prices to other customers low." *Id.* at 444-45 (internal citations and quotations omitted).

Additionally, the meeting competition defense is equally applicable to a seller attempting to retain an old customer or a

seller attempting to gain a new customer. *Id.* at 446. A seller also is not required to meet competition on a customer-by-customer basis in order to take advantage of the meeting competition defense. *Id.* at 448 ("We conclude that Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.").

Finally, a seller must investigate in an attempt to verify the competitor's offer. *F T C v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945); *see also Gypsum*, 438 U.S. at 451-52. This obligation, however, is limited by the prohibitions of the Sherman Act. *See Great A & P Tea Co.*, 440 U.S. at 84 (The seller "could not then attempt to verify the existence and terms of the competing offer from [its competitor] without risking Sherman Act liability."). Open sharing of price information among competitors will tend to stabilize prices, *Gypsum*, 438 U.S. at 457-58, and lead to "the growth of prohibited anticompetitive activity." *Id.* at 458. Thus, "[a] good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense." *Id.* at 453. "Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat is competition." *Great A & P Tea Co.*, 440 U.S. at 83 (*citing Gypsum*, 438 U.S. at 454).

B. Application of the Standard

In analyzing the law of the meeting competition defense and the facts of the case at bar, I "must determine whether [Bayer has] shown 'the existence of facts that would lead a reasonable and prudent person to believe that [its] lower price would meet the equally low price of a competitor' and whether [it has] demonstrated that [its] 'lower price was a good faith response to a competitor's lower price.'" *Reserve Supply*, 971 F.2d at 43 (*citing Falls City*, 460 U.S. at 451). In doing so, I must

keep in mind the indicia of good faith enumerated in *Gypsum*. *Id.*

i) The 1980 Bayer-Rockwood Agreement

The material facts regarding the negotiation of the 1980 Bayer-Rockwood Agreement are uncontested.[10]

Hoover, Rockwood, and Lansco were among several Bayferrox distributors in the 1970's and 1980's. During the 1970's, Bayer produced Bayferrox in West Germany. In late 1980, Bayer opened a new Bayferrox production facility in New Martinsville, West Virginia. McCormack Dep., Vol. I, at 13. The facility had high fixed costs, irrespective of the volume of Bayferrox produced at the facility. The marginal cost of each additional pound of Bayferrox was minimal, however. Because of the high fixed costs, Bayer needed to maximize production at the facility to generate a profit. Meikle Affidavit at ¶ 6; Noble Affidavit at ¶ 4; see also McCormack Dep., Vol. I, at 128. To maximize utilization of the West Virginia facility, Bayer sought to lock its distributors into long term commitments to buy Bayferrox. Stroucken Dep. at 73-74; Meikle Affidavit at ¶¶ 7-8; Noble Affidavit at ¶ 5; McCormack Dep., Vol. I, at 128. Volume discounts were viewed as a possible incentive for distributors to increase their purchases of Bayferrox. Meikle Affidavit at ¶ 8; Noble Affidavit at ¶ 5; Stroucken Dep. at 73-74, 144; McCormack Dep., Vol. I, at 128.

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[10] In this price discrimination action, I am concerned only with the years 1992 through 1996. Nonetheless, the relationship between the principals and the development of the industry throughout the 1980's and 1990's is relevant to my resolution of this issue. *See Gypsum*, 438 U.S. at 455 (reasonableness of threat given the condition of the market and history between seller and favored purchaser are relevant to determination of good faith); *Great A & P Tea Co.*, 440 U.S. at 84 (an established business relationship is relevant to determination of good faith).

Bayer first approached Rockwood, its largest distributor, about a long term commitment to purchase Bayferrox. Entering the negotiations, Bayer was aware that Rockwood purchased and distributed substantial quantities of non-Bayferrox synthetic iron oxides. Meikle Affidavit at ¶ 9; McCormack Dep., Vol. II, at 104; Stroucken Dep. at 144. During negotiations, Rockwood informed Bayer that it had offers for lower priced synthetic iron oxides than Bayer was offering. Meikle Affidavit at ¶ 11. Rockwood demanded that Bayer lower its proposed price for Bayferrox, or Rockwood would not commit to purchase high volumes of the Bayferrox. Meikle Affidavit at ¶ 11; Noble Affidavit at ¶ 9. Rockwood also threatened that unless Bayer lowered its proposed prices, Rockwood would increase its purchases of non-Bayferrox synthetic iron oxides and reduce its purchases of Bayferrox. Meikle Affidavit at ¶ 11; Noble Affidavit at ¶ 9.

Bayer had reason to believe Rockwood's threats. First, Bayer officials believed that Rockwood already purchased one-third of its synthetic iron oxide requirements from other sources. Noble Affidavit at ¶ 6.[11] Second, Bayer knew that Rockwood was a leader in the construction materials market. The lower cost alternatives to Bayferrox were more suitable for use in blends for the construction products segment than for the coatings segment. *See* Stroucken Dep. at 134-36. Thus, Bayer had reason to be concerned that Rockwood could easily use these non-Bayer synthetics as substitutes for Bayferrox. Noble Affidavit at ¶ 11. Third, Bayer verified that synthetic iron oxides were being imported into the country. Meikle Affidavit at ¶ 14; Noble Affidavit at ¶ 10. Fourth, Bayer contacted various end-users who verified the availability

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[11] Rockwood purchased around 19 million pounds of Bayferrox in 1980, Defendant's Exhibit C-3, and in 1980 Bayer was made aware that Rockwood purchased "something like ten million pounds from other sources." Stroucken Dep. at 144.

of lower cost alternatives to Bayferrox. Meikle Affidavit at ¶ 14; Noble Affidavit at ¶ 10.

Based on these uncontested facts, I have no trouble concluding that, as a matter of law, Bayer's proposed discount pricing schedule was made in a good faith attempt to meet competition for Rockwood's business. Bayer has shown the "existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor." *Falls City*, 460 U.S. at 451. Indeed, that is the only reasonable conclusion which the evidence supports. *See Zoslaw*, 594 F.Supp. at 1032.

As for the good faith requirement, that is exhibited by "a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor." *Falls City*, 460 U.S. at 439. Such facts have been demonstrated here. Also, given Bayer's need to maximize productivity at its West Virginia facility, it is clear that Bayer was responding to a "competitive necessity" by meeting the price offered to Rockwood. *See id.* at 441; *see also Great A & P Tea Co.*, 440 U.S. at 73 (need to maximize utilization of new facility may be considered in good faith determination). The indicia of good faith enumerated in *Gypsum* also dictate this result. 438 U.S. at 455; *see also Reserve Supply*, 971 F.2d at 42. First, Bayer asked various end-users whether or not they were aware of lower priced synthetic iron oxides on the market. Second, while they were not threatened with an outright termination of purchase by Rockwood, they were threatened with a reduction in Bayferrox purchases if the discount were not met. Third, Bayer corroborated the availability of imported synthetic iron oxides in the market.

Finally, the price offered by Bayer was obviously geared towards "meeting" the competitive price offered to Rockwood. Bayer conducted a thorough market analysis to determine what price to offer Rockwood to retain their existing business, earn

new business, and still turn a profit. *See* Meikle Affidavit at ¶¶ 15-17; Meikle Affidavit Exhibit A; Noble Affidavit at ¶ 13.

Given Bayer's need to maximize utilization at the West Virginia facility and its determination of the reasonableness of the alleged lower price in light of the market, the only reasonable conclusion is that Bayer offered the lower price to Rockwood in a good faith attempt to meet a competitor's low price.

ii) The 1985 Bayer-Rockwood Agreement

The uncontested material facts also support the conclusion that, as a matter of law, Bayer's proposed discount pricing schedule in 1985 was made in a good faith attempt to meet competition for Rockwood's business.

During the 1985 negotiations, Rockwood again threatened Bayer that it would shift its purchases of synthetic iron oxides away from Bayer and to cheaper alternatives, if Bayer did not offer competitive prices. Noble Affidavit at ¶ 16. Rockwood informed Bayer that Rockwood was "facing strong pressure from imported products which were selling substantially lower than [Bayer's] and Rockwood's current price levels. Furthermore, [Rockwood] indicated that domestic suppliers (Columbian and Pfizer) were being more aggressive by offering special incentives in some cases." Bayer Exhibit, Vol. II, C-2, at BC 001374. From its internal memoranda, its is evident that Bayer continued to recognize that Rockwood's ability to substitute cheaper synthetic oxides for Bayferrox in its production of pigment for the construction products (concrete) segment posed a "substantial threat" to Bayer. Bayer Exhibit, Vol. II, C-3, at BC 001716-17. The "substantial threat" existed, in part, because Bayer still was not fully utilizing the capacity of the West Virginia facility, and the plant remained "extremely dependent on high volume utilization to achieve profitability." Stroucken Dep. at 49.

Again, I find that the uncontested facts support only a conclusion that the price terms offered by Bayer during the 1985 negotiations were made in a good faith attempt to meet competition for Rockwood's business. Regarding the element of good faith, the competitive necessity created by the West Virginia facility still existed, and the facts demonstrate that lower prices were available to the favored purchaser. *See Falls City*, 460 U.S. at 441, 439. Also, applying the *Gypsum* criteria, I find that the evidence requires a finding that Bayer acted in good faith. 438 U.S. at 455; *see also Reserve Supply*, 971 F.2d at 42. First, Rockwood again threatened to reduce its purchases of Bayferrox if Bayer did not present a competitive price. Second, Bayer corroborated the report by analyzing the availability and impact of low cost substitutes for Bayferrox. Finally, Bayer's dealings with Rockwood during the 1980 negotiations weigh heavily in favor of Bayer's good faith.

iii) The 1981 and 1987 Bayer-Lansco Agreements

In 1981 and 1987, respectively, Bayer extended the same basic volume discount schedule included in the 1980 and 1985 Bayer-Rockwood Agreements to Lansco and Hoover.[12] Bayer clearly was under no obligation to lower its price to Lansco and Hoover or to provide them with the same discount schedule as Rockwood. *Falls City*, 460 U.S. at 445 ("The very purpose of the [meeting competition] defense is to permit a seller to treat different competitive situations differently."). Nonetheless, Bayer chose to do so.

Hoover argues that since Bayer did not have to lower its prices to Lansco and Hoover, but it did nonetheless, Bayer must not have been motivated by competition when it lowered prices to Rockwood. According to Hoover, Bayer must have been motivated solely by another interest, namely the

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[12] Hoover bought less Bayferrox than Rockwood and Lansco, so it paid more per pound under the discount schedule.

maximization of production at the West Virginia facility. I disagree. It is uncontested that, in its negotiations with Rockwood, Bayer was motivated by its desire to maximize productivity at the West Virginia plant. The exigencies of the West Virginia facility were an added incentive, for Bayer to maximize sale of Bayferrox by meeting competition. *See Great A & P Tea Co.*, 440 U.S. at 73 (need to maximize utilization of new facility supports finding that it was competitive necessity for seller to match competing offers for buyer's business). During the negotiations commenced by Bayer, however, Rockwood parlayed the availability of lower cost substitutes for Bayferrox into a demand that Bayer provide Bayferrox at a competitive price or lose a substantial portion of Rockwood's business. The availability of these alternatives to Bayferrox were well known throughout the industry, and Bayer correctly assumed that Lansco and Hoover had access to these substitutes. *See* McMahon Dep. at 122 (lower cost alternatives could be obtained "by any distributors."). Therefore, in providing the same discount schedule to Lansco and Hoover as it had provided to Rockwood, Bayer was continuing to meet competition. *See Falls City*, (lower price need not be set on customer-by customer basis). In fact, I find Bayer's willingness to extend the same advantageous discount schedule to Lansco and Hoover indicative of Bayer's good faith during negotiations in the 1980's and 1990's. *See* Hoover Dep. at HCC SJ 520 (Bayer stated that its intention was to provide a level playing field, where all distributors had the same pricing and discounts.); *see* Stroucken Dep. at HCC SJ 1144 (Hoover's volume discount schedule was "part of a distribution schedule that applies to all distributors, and that are volume-driven in the purchases."); McMahon Dep. at 114 (Bayer tried to "handl[e] things . . . neutrally, fairly among all the distributors.").

This finding of good faith is strengthened by the fact that Bayer did not view Hoover as a significant participant in the concrete segment of the industry. Ali Dep. at 79-80;

McCormack Dep., Vol. II, at 41-42; McMahon Dep. at 116-17; Papich Dep. at 135-37. Bayer believed that Hoover was principally involved with natural iron oxides, and that Hoover used synthetic iron oxides to blend with the natural iron oxides and correct any variability in their color. McMahon Dep. at 118; *see also* Bayer Exhibit, Vol. I, B-7, at 02933. Conversely, Bayer officials believed that Lansco was as focused on the construction products segment as the coatings segment. Ali Dep. at 79-80. Thus, even though Hoover was not as capable of taking advantage of the imports as Lansco and Rockwood, Bayer still offered the same volume discount schedule to Hoover.

Finally, even though Lansco did not threaten to reduce its purchases of Bayferrox in 1987, it is clear that an actual threat to reduce purchases is not required in order to take advantage of the meeting competition defense. Since meeting competition defense can be used in lowering prices to purchasers who have never before purchased from the seller, it cannot be argued that a purchaser must threaten to decrease its purchases from a seller in order to use the meeting competition defense. *See Falls City*, 460 U.S. at 446-47 ("[A] seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to 'meet not beat' the competitor's low price. . . . Section 2(b), however, does not distinguish between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers.") (quotations and citations omitted).

Thus, I find that the uncontested evidence would lead a reasonable and prudent person to believe that Bayer's lower price to Lansco was intended to meet equally low prices available from the seller's competitors in the marketplace.

iv) The 1990 Bayer-Rockwood Agreement

Imports of low cost synthetic iron oxides continued to increase during the late 1980's and early 1990's. *See* Bayer Exhibit, Vol. I, B-4, at BC 002621 ("The decrease in our sales to distributors from 1989-91 reflects the economic recession, and the purchases by Rockwood of low priced material imported from China.") These imports were more suitable as substitutes in the expanding construction products segment of the market than in the coatings segment.[13] The combined market pressures of increasing imports and growth of the construction segment were present when Rockwood and Bayer renegotiated their supply agreement in 1990.[14]

During the negotiations, Rockwood complained that the changing market dynamics forced them to increasingly compete against lower cost material. McMahon Dep. at 121. Rockwood indicated that it would begin searching for alternate sources of synthetic iron oxides. Bayer Exhibit, Vol. I, B-13. Rockwood advised Bayer that it could still obtain lower cost substitutes for Bayferrox. Paris Affidavit at ¶ 9; Stroucken Dep. at 110; McCormack Dep., Vol. II, at 40; McMahon Dep. at 121. Bayer relied upon Rockwood's concerns in offering the prices included in the 1990 Bayer-Rockwood Agreement. McMahon Dep. at 121-22. I find that these uncontested facts, viewed in the context of the changing market and the factors

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[13] *See* Bayer Exhibit, Vol. II, C-6, at BC 002558 ("Coating is no longer the critical factor to the rise or fall of global iron oxide pigment market, the critical factor is now the construction industry. Since 1980, global construction industry (especially western Europe and north America) is in the ascendant, which caused the global iron oxide pigment market blooming.").

[14] The 1985 contract had a five-year life, but, it could be continued indefinitely. Because "the market dynamics were changing," the 1985 five- year contract was not continued. McMahon Dep. at 92-94; *see also* Stroucken Dep. at 110.

enumerated in *Gypsum*, leave as the only reasonable conclusion that Bayer altered its price structure during the 1990 negotiations in an attempt to meet competition from foreign producers for Rockwood's business.

v) The 1994 Bayer-Rockwood and Bayer-Lansco Agreements

The availability of the lower cost imports increased dramatically in the 1990's. Just weeks after negotiating the 1990 contract extension, Rockwood notified Bayer of a Chinese offer to sell synthetic iron oxide at a price much lower than provided in the Bayer-Rockwood Agreement. The offer was so low, in fact, that Bayer was incapable of matching it. *See* Bayer Exhibit, Vol. I, B-14.[15] On February 13, 1992, Rockwood again notified Bayer that it had received an offer form a foreign source to sell synthetic iron oxides at a lower price than the price under the 1990 Bayer-Rockwood Agreement. Bayer Exhibit, Vol. I, B-5, at BC 002491; *see also* Bayer Exhibit, Vol. I, B-15; Bayer Exhibit, Vol. I, B-16; Paris Affidavit at ¶ 12.[16] This letter was prompted by Rockwood's concern about Bayer's price of Bayferrox and the

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[15] Hoover contends that Bayer could not have been "meeting competition" in the 1990's if it refused to meet this Chinese offer. I disagree. The meeting competition defense does not require a seller to meet all competition. The defense protects a seller from being forced to choose between a decision to not meet a lower price or a decision to provide all purchasers the same lower price, either of which could be ruinous. *See Falls City*, 460 U.S. at 444-45. It is illogical then to hold a seller to a requirement that, in order to take advantage of the meeting competition defense, he meet all lower prices, when such a price itself could be ruinous.

[16] It is unclear whether Bayer ever met this offer, or whether Rockwood ended up purchasing from the supplier.

lower cost imported pigments. Rapaport Dep. at 83-84.[17] Rockwood was concerned that these low cost pigments could dramatically impact the construction side of the business. Rapaport Dep. at 83.[18] These are just two examples of how the amount of imported synthetic iron oxides dramatically increased in the early 1990's.[19]

While there was an increase in imports which presented problems for Bayer, there also was a consolidation of producers and distributors in the 1990's which troubled Bayer. In 1992, Rockwood was acquired by Laporte, a construction

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[17] It is unclear whether the letter refers to a lower cost European substitute, *see* Bayer Exhibit, Vol. I, B-15, at BC 001943, or a lower cost Chinese substitute, *see* Rapaport Dep. at 80-86.

[18] In 1992, Rockwood's business was 60% to 66% in the construction business. Rapaport Dep. at 36.

[19] For a further discussion on the increase of foreign iron oxides in the 1990's, *see* generally Bayer Exhibit, Vol. II, C-6, at BC 002538-BC 002542; Paris Affidavit at ¶¶ 10-12; McCormack Dep., Vol. II, at 40, 107; Rapaport Dep. at 80-86, 140, 142-43; Bayer Exhibit, Vol. I, B-5, at BC 002490 (Rockwood has "monitored the U.S. efforts of foreign Iron Oxide manufacturers and agents and have seen their presence increase.").

Bayer felt the effects of the increased availability of imported synthetic iron oxides in a decline in purchases by Rockwood. From 1991 through 1995, Rockwood dramatically increased its purchases of imported synthetic iron oxides, *see* Bayer Exhibits, Vol. II, C-13, at BC 003559; Paris Affidavit at ¶ 4, while its purchases of Bayferrox declined, *see* Rapaport Dep. at 23 (Between 1992 and 1996, Rockwood "decreased [its] dependence and consumption on the Bayferrox and increased [its] utilization of other pigments."), 30 (Rockwood's purchases of Bayferrox remained "significant, but declin[ed] each year" after 1992), 44 (purchases of Bayferrox "declined during the period 1992 to 1996 as we made ourselves available to other sources of material"). In the same period, Lansco's purchases of imported synthetic iron oxides increased by 400%. The impact was not limited to Rockwood and Lansco. Imports rose from 10% of the total market for synthetic iron oxides in 1991 (17.8 million pounds) to 22% in 1994 (49.3 million pounds). *See* Bayer Exhibit, Vol. II, C-13, at BC 003559.

products manufacturer. Additionally, in the early 1990's, Laporte was considering purchasing Silo and Columbian, manufacturers of synthetic iron oxides. These acquisitions would make Laporte a fully vertically integrated competitor of Bayer. Bayer was concerned that these acquisitions would lead to a further decrease in Rockwood's purchases of Bayferrox. *See* Bayer Exhibit, Vol. I, B-2 ("Between 60% and 75% of Rockwood's Bayferrox purchases could be replaced in 2-3 years by Silo, Columbian and Chinese materials. . . . If [Bayer] were unable to regain this volume in the marketplace, the profit impact to [Bayer] alone would be sever [sic]."); Bayer Exhibit, Vol. II, C-1, at BC 000388 (The "loss of volume [caused by Laporte's acquisition of Silo] would significantly impact Bayer/Miles' sales and profitability. This situation is particularly critical in North America, because of Laporte's recent acquisition of our largest Bayferrox distributor, Rockwood."), at BC 000389 ("Rockwood's purchases of Bayferrox are critical to the financial success of our North American Pigments business, and to our market leadership position in the strategically important construction industry. It is critical that we find a way to secure this volume both short and long term."). Laporte purchased Silo in September of 1992. *See* Bayer Exhibit, Vol. I, B-2.

Because of the threats to its distribution network Bayer decided to restructure the network. *See* Bayer Exhibit, Vol. I, B-2, at BC 002445; Bayer Exhibit, Vol. I, B-3, at BC 002445; McCormack Dep. at 20-24, 34-35. Bayer decided to reduce its dependence on outside distributors. *See* Bayer Exhibit, Vol. I, B-3, at BC 002445; Bayer Exhibit, Vol. I, B-4, at BC 002621 ("The trend in [Bayer's] sales toward a high portion of direct sales reflects the business group's efforts to reduce the dependence on distributor sales.").[20]

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[20] Bayer eventually canceled its contracts with Rockwood (effective January 1, 1997) and Hoover (effective January 1, 1998), and acquired

The continued increase in imports and the consolidation of the industry presented further difficulties for Bayer because its objective remained the maximum utilization of the West Virginia facility. McCormack Dep., Vol. I, at 128-29. Facing these competitive pressures, Bayer again renegotiated its contracts with Rockwood and Lansco in 1994, several years after Laporte's acquisition of Rockwood and before Bayer's acquisition of Lansco.

During the negotiation of the 1994 Bayer-Rockwood Agreement, it is clear that Rockwood, either explicitly or implicitly, threatened to, and in fact did, reduce its purchases of Bayferrox. *See* McCormack Affidavit at ¶ 6; *see also Reserve Supply*, 971 F.2d at 45-46 (possibility of loss of business which "was clearly implicit within the [relevant] market" was sufficient "threat" under § 2(b)). Given the changes in the international market for synthetic iron oxides and Bayer's continued need to maximize productivity at its West Virginia facility, Bayer was in a "situation of competitive necessity" and was justified in meeting the competitive offers made to Rockwood. *See Falls City*, 460 U.S. at 441.

Hoover contends that the fact that the 1990 and 1994 negotiations resulted in actual price increases precludes Bayer from invoking the meeting competition defense. Clearly, this argument is incorrect. "Nothing in § 2(b) requires a seller to lower its price in order to meet competition. . . . A seller is required to justify a price difference by showing that it reasonably believed that an equally low price was available to the purchaser and that it offered the lower price for that reason; the seller is not required to show that the difference resulted from subtraction rather than addition. . . . In a period of generally rising prices, vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts. Thus, a price discrimina-

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Lansco (October of 1996).

tion created by selective price increases can result from a good faith effort to meet a competitor's low price." *Falls City*, 460 U.S. at 444 (emphasis in original). In this case, there is ample evidence that in the late 1980's and early to mid-1990's, prices in the synthetic iron oxide industry were generally increasing. *See* Bayer Exhibit, Vol. I, B-5, at BC 02490 (noting "rising costs of operating and environmental compliance"); Bayer Exhibit, Vol. II, C-6, at BC 002539 (1994 memorandum stating "In the wake of the rapid growth of construction industry, iron oxide pigment has been in rather short supply in the global market for the past few years, and the price has been rising constantly"); Bayer Exhibits, Vol. II, C-6, at BC 002557 ("From early 1990 onwards, due to the cost of energy is rising, the price of synthetic iron oxide worldwide is going up. . . .").

Like Rockwood, Lansco was shifting purchases of synthetic iron oxides away from Bayer and to foreign producers. *See* D. Greenwald, Dep. at 81-82. In fact, Lansco's purchases of Bayferrox dropped from sixteen million pounds to thirteen million pounds in 1993. Lansco substituted Mexican and Chinese oxides for Bayferrox. D. Greenwald, Dep. at 81-82. Given the realities of the market, Bayer was aware that Lansco had competitive offers for synthetic iron oxides from other sources. *See Reserve Supply*, 971 F.2d at 44-46 (view reasonableness of competing offer "in light of market conditions;" "implicit" threats can be inferred from market conditions). In fact, Lansco had informed Bayer that it had been presented with lower offers, and that was one reason offered by Lansco for wanting to renegotiate the agreement. McCormack Dep., Vol. II, at 102; McCormack Affidavit at ¶ 7. These competitive offers concerned Bayer, thus, Bayer reacted with what it believed were competitive counteroffers. McCormack Dep., Vol. II, at 103.

Hoover argues that Bayer was not motivated to meet competition for Lansco's business in 1994. Hoover contends that Bayer sought to renegotiate the volume discount schedule

in an attempt to lower the amount of Lansco's discount and to stabilize the fluctuations in Lansco's demand. Undoubtedly, numerous issues were of particular interest to one party or the other during the negotiation of the 1994 contract. In a complex contract, negotiations will always involve many issues. For example, in the face of increasing prices in the market, Bayer sought to reduce the discount given to Lansco. On the other hand, Lansco sought to prevent any price increase. Bayer also wanted to resolve issues involving a customer of Lansco, Hamburger, and both parties wanted to stabilize Lansco's demand. Lansco hoped to increase its allowable purchases of imported iron oxides. *See* Hoover Exhibit at HCC SJ 0336-358. None of these issues lessen the fact that when Bayer offered its price to Lansco, it did so (1) in light of the developments in the synthetic iron oxides market, including the increase in imports and expansion of the construction products segment, (2) with knowledge, either explicitly or implicitly, that Lansco had access to lower cost substitutes for Bayferrox, and (3) faced with a competitive necessity to maximize production at its West Virginia facility. Despite the other issues addressed in agreeing to the 1994 contract, the material facts, when viewed in the light most favorable to Hoover, could only lead a reasonable and prudent person to believe that Bayer's lower price was offered in a good faith attempt to meet competition for Lansco's business.

Again, the uncontested material facts establish that equally low prices were available to Lansco and Rockwood,[21] and that Bayer was faced with a competitive necessity to meet

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[21] Bayer was aware of other available sources of synthetic iron oxides by way of direct communication from Rockwood and Lansco, past dealings with Rockwood and Lansco, and by inference from its knowledge of the synthetic iron oxides market.

competition for Lansco's and Rockwood's business.[22] In light of the condition of the synthetic iron oxides market and the factors enumerated by the Supreme Court in Gypsum, only one reasonable conclusion exists: as a matter of law, Bayer was meeting competition in good faith in 1994 when it effectively offered to sell Bayferrox to Lansco and Rockwood at prices which were lower than the price at which it sold Bayferrox to Hoover.

CONCLUSION

The uncontroverted evidence regarding the relationship of the principals and the dynamic market for synthetic iron oxides in the 1980's and 1990's clearly establishes that Bayer offered its lower prices to Rockwood and Lansco out of a good faith competitive necessity to meet competition for their business. Hoover fails to present any material evidence to counter this conclusion.

Accordingly, for the aforementioned reasons, the defendant's motion for summary judgment is GRANTED.

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[22] The competitive necessity was created by the need to maximize productivity at the West Virginia facility.

[Filed Dec. 27, 1999]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOOVER COLOR CORPORATION,
Plaintiff-Appellant,
v.
BAYER CORPORATION,
Defendant-Appellee.

No. 98-2239
CA-96-841-R

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDER that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
CLERK